DOCKET

No. 07-543
Title: AT&T Corporation, Petitioner
v.
Noreen Hulteen, et al.
Docketed: October 24, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-16087)
Decision Date: August 17, 2007
Questions Presented

---Date---	-------Proceedings and Orders----------
Oct 22 2007	Petition for a writ of certiorari filed. (Response due November 23, 2007)
Nov 20 2007	Order extending time to file response to petition to and including December 26, 2007.
Dec 21 2007	Brief of respondents Noreen Hulteen, et al. in opposition filed.
Jan 2 2008	DISTRIBUTED for Conference of January 18, 2008.
Jan 2 2008	Reply of petitioner At&T Corporation filed. (Distributed)
Jan 22 2008	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 21 2008	Brief amicus curiae of United States filed.
Jun 3 2008	DISTRIBUTED for Conference of June 19, 2008.
Jun 3 2008	Supplemental brief of respondents in response to brief amicus curiae of the United States filed. (Distributed)
Jun 23 2008	Petition GRANTED.
Jul 9 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 8, 2008.
Jul 9 2008	The time within which to file respondents' brief on the merits is extended to and including November 7, 2008.
Sep 8 2008	SET FOR ARGUMENT ON Wednesday, December 10, 2008.
Sep 8 2008	Joint appendix filed. (statement of costs filed)
Sep 8 2008	Brief of petitioner AT&T Corporation filed.
Sep 11 2008	Consent to the filing of amicus briefs, in suport of either party or neither party, received from counsel for the petitioner.
Sep 11 2008	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for respondents.
Sep 12 2008	CIRCULATED.
Sep 15 2008	Brief amicus curiae of United States filed. (Distributed)
Sep 15 2008	Brief amicus curiae of ERISA Industry Committee filed. (Distributed)
Sep 15 2008	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)

Oct 6 2008	Record received from the U.S.C.A. for the 9th Circuit. The U.S.D.C. for the Northern District of California record is included.
Oct 9 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 7 2008	Brief of respondents Noreen Hulteen, et al. filed. (Distributed)
Nov 14 2008	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Nov 14 2008	Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)
Nov 14 2008	Brief amici curiae of Caitlin Borgmann, et al. filed. (Distributed)
Nov 14 2008	Brief amici curiae of National Women's Law Center, et al. filed. (Distributed)
Nov 14 2008	Brief amicus curiae of AARP filed. (Distributed)
Nov 17 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 2 2008	Reply of petitioner AT&T Corporation filed. (Distributed)
Dec 10 2008	Argued. For petitioner: Carter G. Phillips, Washington, D.C.; and Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Kevin Russell, Bethesda, Md.

PETITION FOR WRIT OF CERTIORARI

No. 07- 07-543 FILED OCT 22 2007

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Before the passage of the Pregnancy Discrimination Act of 1978 (PDA), it was lawful to award less service credit for pregnancy leaves than for other temporary disability leaves. *Gilbert* v. *Gen. Elec. Co.*, 429 U.S. 125 (1976). Accordingly, the questions presented are

1. Whether an employer engages in a current violation of Title VII when, in making post-PDA eligibility determinations for pension and other benefits, the employer fails to restore service credit that female employees lost when they took pregnancy leaves under lawful pre-PDA leave policies.

2. Whether the Ninth Circuit's finding of a current violation of Title VII in such circumstances gives impermissible retroactive effect to the PDA.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

AT&T Corporation ("AT&T") is a wholly owned subsidiary of AT&T Inc., a publicly traded company. No entity owns more than 10% of AT&T Inc. stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner AT&T Corporation ("AT&T") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the United States District Court for the Northern District of California, in which it granted summary judgment against AT&T, is unreported, and is reproduced in the Appendix to this Petition ("App.") at 98a-128a. The initial decision of the Ninth Circuit is reported at 441 F.3d 653 (9th Cir. 2006), and is reproduced at App. 64a-97a. The Ninth Circuit granted rehearing en banc in an order that is reported at 455 F.3d 973 (9th Cir. 2006), and is reproduced at App. 129a. The en banc decision of the Ninth Circuit—which is the judgment under review here—is published at __ F.3d __ (9th Cir. 2007), and is reproduced at App. 1a-63a.

JURISDICTION

The court of appeals, sitting en banc, entered judgment on August 17, 2007, App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), and other relevant statutes are reproduced at App. 130a-131a.

INTRODUCTION

This case presents a square and acknowledged conflict among the circuits on an important and recurring question of Title VII law—namely, whether

a seniority system may give present effect to a non-actionable past act of discrimination, or whether doing so constitutes a new violation of Title VII. The majority of the en banc panel below "perpetuate[d] a circuit split with the Sixth and Seventh Circuits" by adhering to a 1991 panel decision that "[n]o circuit has followed" in over 16 years. App. 29a & n.1 (O'Scannlain, dissenting). The majority acknowledged that its decision conflicted with the decisions in *Leffman* v. *Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007), and *Ameritech Benefit Plan Committee* v. *Communications Workers of America*, 220 F.3d 814 (7th Cir. 2000); indeed, *Ameritech* involved the very same seniority system at issue here. The majority believed, however, that these circuits had misconstrued Title VII's *bona fide* seniority system provision and this Court's seminal interpretations of Title VII in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), and *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (per curiam).

The en banc panel also divided sharply over the meaning of this Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). The dissenters read *Ledbetter* and *Evans* (correctly) to mandate dismissal of this suit. Indeed, the dissent demonstrated that there was "no meaningful basis for distinguishing *Evans* and this case," as the employers in both did nothing more than "g[ive] effect through [a] seniority system to past discriminatory acts." App. 49a. Moreover, in its strained attempt to distinguish *Ledbetter* and *Evans*, the majority had given an impermissibly retroactive effect to the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076. App. 45a-46a.

The issues raised in this case will arise with greater frequency in the future, and will affect

employers and employees across the nation. Many large employers treated pregnancy leaves differently than other leaves prior to the PDA, and the women affected by those policies are now reaching retirement age. It is fundamentally unfair to employers and employees for the same national benefits plan to result in different benefits solely as a function of geography. This Court's intervention is thus necessary to resolve the conflict in the circuits and to correct the Ninth Circuit's misapplication of the PDA.

STATEMENT OF THE CASE

A. Statutory Background

Title VII bars discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). This Court held in 1976, however, that the exclusion of pregnancy from a general disabilities plan did not constitute discrimination under the statute. *Gilbert* v. *Gen. Elec. Co.*, 429 U.S. 125 (1976). Two years later, Congress responded to *Gilbert* by passing the PDA, which amended Title VII to include discrimination based on pregnancy.

Although the law took effect on the date of its enactment, Congress expressly provided employers an additional 180 days to modify pre-existing benefits policies to treat pregnancy leaves the same as other forms of temporary disability. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 671 n.2 (1983) (interpreting §§ 2(a)-(b) of the PDA). Every court to have considered the issue has thus concluded that the Act does not apply retroactively. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 257 n.10 (1994) ("The only Courts of Appeals to consider whether the 1978 amendments [to the Civil Rights Act] applied to pending cases concluded that they did

not.").[1] This Court, moreover, noted that a nearly identical "effective-date" provision contained in the 1991 Civil Rights Act "impl[ied] nonretroactivity." *Id.*

B. The Underlying Dispute

AT&T's seniority system is called the Net Credited Service ("NCS") system.[2] An employee's first day on the job becomes her NCS date. The earlier the date, the better positioned the employee is for service-related determinations, such as vacation time and retirement benefits. That NCS date is then adjusted to correspond to the actual time worked. Accordingly, an employee's NCS date is moved forward in time to reflect any period of leave or other absences for which less than full service credit is given. Thus, for example, if an employee commenced employment on January 1, 1970, and took six months of uncredited leave in 1980, his NCS date would be moved to July 1, 1970. An NCS date draws no distinctions based on sex, pregnancy or any other characteristic; it is simply a date.

Prior to August 7, 1977, AT&T lawfully classified pregnancy leaves as personal leaves, not disability leaves. The distinction was significant because NCS adjustments were handled differently for those

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[1] *See also Ameritech*, 220 F.3d at 823; *Whitehead* v. *Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir. 1999); *Wambheim* v. *J.C. Penny Co.*, 642 F.2d 362, 363 n.1 (9th Cir. 1981); *Fields* v. *Bolger*, 723 F.2d 1216, 1219 n.4 (6th Cir. 1984); *Schwabenbauer* v. *Bd. of Educ.*, 667 F.2d 305, 310 n.7 (2d Cir. 1981); *Condit* v. *United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980).

[2] Respondents were originally employed by Pacific Telephone & Telegraph ("PT&T") and were later transferred to AT&T when the Bell telephone system dissolved in 1984. For the sake of convenience, respondents' employer will be referred to throughout as AT&T, *i.e.*, PT&T's successor-in-interest.

categories of leave. For personal leaves, employees were paid, and received service credit, for only the first 30 days of leave. Employees who took longer leaves did not accrue seniority for any time beyond 30 days. By contrast, no such limit existed for employees who missed work due to paid temporary disability. They received full service credit for the period of their absence, and their NCS dates were not adjusted as a result of such leaves.

On August 7, 1977, AT&T extended the maximum pregnancy NCS credit to 30 days before delivery and six weeks after delivery. When the PDA became effective on April 29, 1979, AT&T immediately began to provide the same full service credit for maternity leave that it provided for other types of disability leave. Indeed, from 1979 forward, AT&T's leave policies have treated maternity leave the same as all other paid disability leaves. App. 4a-5a.

AT&T did not, however, retroactively award additional service credit to (and re-adjust the NCS dates of) women who had taken maternity leave before 1979. Nor has AT&T done so in the time since the individual plaintiffs became its employees. The parties stipulated below that AT&T may adjust an employee's NCS date when "the date has been calculated incorrectly" or "the change is necessary to comply with legal requirements." ER R 58 ¶ 104.[3]

Respondents are current and former AT&T employees who took pregnancy leaves between 1968 and 1976 and who, as a consequence, did not accrue full service credit during those pre-PDA leaves.

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[3] AT&T adjusted the NCS date of respondent Snyder because she was not given the 30 days service credit she had been entitled to under the then-extant policy at the time of her pregnancy leave. ER R 58 ¶ 63.

When respondent Hulteen[4] retired in 1994, she had "210 days of uncredited pregnancy leave that resulted in reduced pension benefits." App. 5a. Arguing that her retirement benefits were therefore calculated unlawfully, she filed suit in the United States District Court of the Northern District of California.

C. The District Court's Opinion

Having stipulated to all of the material facts, the parties filed cross-motions for summary judgment. Hulteen chiefly relied on a prior Ninth Circuit decision, *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), in which the court found that an identical NCS system calculation violated the PDA. AT&T agreed that the facts were identical to those presented in *Pallas*, but argued that *Pallas* was no longer controlling law because intervening decisions from this Court, beginning with *Landgraf*, demonstrated that *Pallas* had given the PDA an impermissible retroactive effect.

Pallas, like respondents, took maternity leave prior to the effective date of the PDA. In 1987, Pallas's employer, Pacific Bell, initiated a new early retirement program available only to employees who had worked a minimum number of years for Pacific Bell. Pallas was ineligible for the retirement program because her pregnancy leave had left her with insufficient service credit. Consequently, Pallas sued Pacific Bell for violating the PDA.

On appeal, the Ninth Circuit held that Pallas stated a claim under Title VII. The court held that, although Pallas had been denied full service credit for

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[4] In addition to Hulteen, respondents include Eleanora Collet, Linda Porter, Elizabeth Snyder, and the Communications Workers of America, AFL-CIO.

a pregnancy leave taken prior to the PDA, Pacific Bell's continued reliance in 1987 on Pallas's NCS date perpetuated that earlier discrimination and rendered the NCS system itself facially discriminatory. The Ninth Circuit thus held that Pallas had stated a claim for a current violation of Title VII. *Pallas*, 940 F.2d at 1327 ("While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy.").

In this case, AT&T argued that *Pallas* had necessarily given the PDA impermissible retroactive effect. It could not be unlawful to rely on previously lawful service credit calculations unless the PDA had retroactively altered the legality of those earlier leave-treatment decisions. And, under *Landgraf* and its progeny, the PDA could not be given retroactive effect.

The district court reluctantly applied *Pallas* to sustain respondents' claim. It noted that AT&T's arguments had "great logical and legal force," App. 121a, but found itself constrained by *Pallas* to deny AT&T's motion for summary judgment and to grant respondents'. *Id.* at 123a, 128a. It certified the issue for interlocutory appeal. ER R 101.

D. The Initial Panel Opinion

The initial panel of the Ninth Circuit held that *Pallas* was no longer controlling law in light of *Landgraf* and subsequent retroactivity cases. The panel reasoned that:

> [t]he failure to award employees full service credit for their pregnancy leaves could be labeled facially discriminatory only if employees in both groups were similarly situated, e.g., if all were

> legally entitled to receive full credit for their leaves before the enactment of the PDA. But that would be true only if the PDA were given impermissible retroactive effect.

App. 80a.

Judge Rymer dissented solely on whether *Pallas* was "clearly irreconcilable" with intervening authority such that it no longer bound the panel. App. 88a. Notably, however, Judge Rymer did "not disagree with [her] colleagues' take on what a correct analysis, on a fresh slate, should look like." *Id.* at 86a.

E. The En Banc Decision

A sharply divided en banc panel reaffirmed *Pallas*'s holding that post-enactment reliance on pre-PDA service credit calculations violates Title VII. The majority adopted *Pallas*'s conclusion, App. 9a, that this case was controlled by *Bazemore*, where this Court held that an employer's decision to continue paying black workers less than similarly situated white workers after the employer became subject to Title VII constituted a new violation of Title VII. 478 U.S. at 395 (Brennan, J., joined by all other Members of the Court, concurring in part). The majority thus rejected AT&T's argument, App. 9a & n.4, that the relevant controlling authority is *Evans*, where this Court held that a new violation does not occur when a "seniority system gives present effect to [a time-barred] past illegal act and therefore perpetuates the consequences of forbidden discrimination." 431 U.S. at 557. The majority also rejected AT&T's argument that *Ledbetter* dictated dismissal of respondents' claim. The majority reasoned that *Ledbetter* involved a facially neutral policy, whereas the NCS system is, in the majority's view, facially discriminatory. App. 10a n.5.

The majority also rejected AT&T's argument that *Pallas* had given the PDA retroactive effect. The majority reasoned that "[o]nly one Supreme Court decision cast doubt on whether Title VII prohibited employers from discriminating on the basis of pregnancy," and that the "PDA therefore did not alter Hulteen's or AT&T's rights or liabilities under Title VII, but corrected *Gilbert*'s erroneous interpretation of Title VII." App. 11a n.6.

The majority acknowledged that its holding squarely conflicts with the decisions of the Seventh Circuit in *Ameritech* and the Sixth Circuit in *Leffman*. App. 22a, 27a n.11. The majority faulted the Seventh Circuit for failing to agree with *Pallas* that the NCS system is facially discriminatory. App. 22a-23a. And it faulted the Sixth Circuit for following *Ameritech*. *Id.* at 27a n.11. The majority argued that the Sixth Circuit had failed to appreciate that, if Leffman had been given full service credit for her pre-PDA pregnancy leave, "she would have qualified for early retirement benefits in 2000 like other employees who received credited leave time when they were similarly unable to work for reasons other than pregnancy." *Id.*

Judge O'Scannlain, joined by Judges Rymer, Bybee, and Callahan, dissented.[5] The dissent argued that, by characterizing respondents' claim as a current violation of Title VII, the majority "erroneously perpetuates a circuit split with the Sixth and Seventh Circuits," App. 29a, and contravenes decisions of this

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[5] Although Judge Rymer dissented from the initial opinion because she believed that *Pallas* was binding on panels, she joined the dissent without reservation when the court, sitting en banc, was able to consider the issue anew, no longer bound by *Pallas*.

Court, including *Evans* and *Ledbetter*, which hold that "'current effects alone cannot breathe life into prior, uncharged discrimination.'" *Id.* at 43a (quoting *Ledbetter*, 127 S. Ct. at 2169). Under the logic of these cases, respondents' claim should be dismissed.

The dissent explained that *Evans* and *Ledbetter* could not be avoided by labeling the NCS system "facially discriminatory." Eligibility and benefits are determined based on NCS dates, which are facially neutral. App. 44a. The majority's conclusion that the NCS system treats "similarly situated" employees differently "necessarily depends on a retroactive application of the PDA." *Id.* at 45a. Women who took pre-PDA pregnancy leaves were not "similarly situated" to workers who took leaves prior to 1979 for other reasons because, under AT&T's then lawful policies, those women were not entitled to the same full service credit for those leaves. *Id.* at 45a-46a. The two groups of workers could be deemed "similarly situated," therefore, only if the PDA retroactively eliminated this previously lawful distinction. *Id.*

Stripped of the false premise of "facial discrimination," the dissent explained, this case was indistinguishable from *Evans*. "Because of the past acts of discrimination, Evans and Hulteen had less seniority, and, not surprisingly, the determinations of their benefits . . . were adversely affected." App. 49a. Unlike the situation in *Bazemore*, moreover, AT&T did not simply continue a pre-enactment practice (granting less than full service credit for pregnancy leaves) after Congress had outlawed that practice; instead, AT&T had failed to remedy pre-enactment discrimination, which *Bazemore* expressly held was not required. *Id.* at 51a-53a.

REASONS FOR GRANTING THE PETITION

This case raises important and recurring questions of federal law that have persistently bedeviled and divided the lower courts. The first question is whether an employer may rely on a non-actionable past act of discrimination, or whether such reliance constitutes a new violation of Title VII. In examining this issue in the context of pre-PDA seniority calculations, 23 judges (including the initial panel below) have divided 12 to 11 on this question. In *Ameritech*, the Seventh Circuit observed that "the line between continuing violations that arise with each new use of [a] discriminatory act . . . and past violations with present effects . . . is subtle at best." 220 F.3d at 823. As the decision below makes clear, *Ledbetter* did not dispel the confusion: just months after its issuance, 15 judges of the Ninth Circuit could not agree on *Ledbetter*'s meaning or impact on this case.

The number of cases concerning the *Evans/Bazemore* line attests to the persistence of the issue and the difficulties it poses for lower courts. And, the particular variant of the issue raised in this case—past acts of (lawful) discrimination against women who took pregnancy leaves prior to the PDA—will continue to arise with frequency for the foreseeable future. As this case and *Gilbert* illustrate, many large employers treated pregnancy leaves differently than other temporary disability leaves prior to the PDA. A large number of women who took pregnancy leaves in their 20s and 30s in the 1970s are approaching retirement age and will soon be awarded pensions and other benefits based on their seniority. The division among the circuits thus creates great uncertainty as to whether employers can continue to

rely on service credit calculations they made decades ago under then-lawful pregnancy leave policies.

For AT&T and other national employers, the circuit split poses immediate and intractable problems. When determining eligibility for pension and other benefits, AT&T can rely on the NCS dates of its employees in the Sixth and Seventh Circuits, but will incur Title VII liability for this same conduct in the Ninth Circuit. Because a seniority system must operate uniformly for all employees, AT&T can avoid such liability only by recalculating the NCS dates of all formerly pregnant employees, regardless of whether they work in the states covered by the Ninth Circuit. Doing so, in turn, will affect the rights based on seniority of other employees, both male and female. It is unfair to AT&T and potentially many of its employees to compel such an undertaking when the majority of circuits, and the majority of federal judges, have concluded that the conduct at issue is not unlawful. Indeed, such a result is particularly unfair because, as the dissent explained cogently below, the decision in this case is fundamentally inconsistent with the decisions of this Court in *Evans* and *Ledbetter*.

The second, and closely related, issue is whether the decision gives the PDA an impermissible retroactive effect. As the plethora of this Court's post-*Landgraf* cases demonstrates, the failure of many lower courts to recognize when they are giving statutes retroactive effect is a recurring and vexing problem. Here, the majority denied it was applying the PDA retroactively, but its analysis and the result it reached show the majority did just that, creating yet another (this time unacknowledged) circuit split. Because many women who took pre-PDA pregnancy leaves are reaching retirement age, it is critical that

this Court address the question whether post-PDA reliance on pre-PDA service credit calculations can render a seniority system facially discriminatory absent retroactive application of the PDA.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

This case presents a square and irreconcilable conflict among the circuits concerning the legality of seniority systems that give present effect to then-lawful pre-PDA leave policies that did not award full service credit for pregnancy leaves. Indeed, the decisional conflict with the Seventh Circuit is particularly disturbing. *Ameritech* involved the same legacy Bell System NCS system and the same Bell System pre-PDA leave policies at issue here. Because Ameritech (like AT&T) did not retroactively award service credits for women who took their maternity leave prior to the PDA, the employees raised precisely the same challenge that respondents asserted here. In *Leffman*, the Sixth Circuit addressed an identical discrimination claim (though not the exact same seniority system) as in this case and *Ameritech*. The Seventh and Sixth Circuits' analysis of these claims diverged in every relevant respect from that of the majority below.

In the decision below, the majority endorsed *Pallas*'s view that such a claim was governed by *Bazemore*. The Seventh Circuit, however, held that *Evans* and its progeny controlled. The Seventh Circuit noted that the relevant conduct was the computation of seniority "followed by a neutral application of a benefit package to all employees with the same amount of time." *Ameritech*, 220 F.3d at 822-23. *Evans* was the controlling authority, therefore, because it also involved a loss of seniority due to

earlier discrimination, followed by "[t]he continuing impact of the earlier action, within the context of an otherwise neutral system." *Id.* at 822. The Sixth Circuit followed this same reasoning in *Leffman*. Citing one of its earlier precedents, which in turn relied on *Evans*, the Sixth Circuit found it "clear that plaintiff[ ] present[s] claims of continuing effects of past discriminatory acts, and not do[es] not claim discriminatory acts within the statutory charging period." 481 F.3d at 433 (internal quotation marks omitted; alterations in original).

The Seventh Circuit also found § 703(h) supported rejection of the plaintiffs' claim because that provision "exempts discriminatory effects that flow from *bona fide* seniority systems from the definition of unlawful employment practices, as long as the differences are not the result of an intention to discrimination." *Ameritech*, 220 F.3d at 823. The NCS system was *bona fide*, *i.e.*, "facially neutral," the Seventh Circuit found, because *Gilbert* "held that Title VII did not prohibit distinctions based on pregnancy," and "the PDA has not been treated as a retroactive statute." *Id.* Accordingly, "Ameritech would have had no reason to think it had to reshuffle its NCS list after the Act had passed," *id.*—*i.e.*, to award retroactive service credit to women who took pre-PDA pregnancy leaves.

The Sixth Circuit likewise found that Sprint's similar seniority system was facially neutral.

> Leffman does not contend that Sprint treats employees who have taken non-credited maternity leave differently from employees who have taken other kinds of non-credited leave. Rather, all non-credited leave is excluded from Sprint's seniority calculations, and thus the effects of Sprint's past characterizations (whether

> justifiable or not) of leaves of absence as non-credited are now felt equally by men and women and by those with and without children.

Leffman, 481 F.3d at 433.

The majority below, by contrast, held that the NCS system is "facially discriminatory" precisely because it relies on pre-PDA service credit decisions. Indeed, the majority even disagreed with the Seventh Circuit over the legality of such pre-PDA decisions, making the astounding (and manifestly erroneous) claim that distinctions based on pregnancy were unlawful before the PDA, because "[o]nly one Supreme Court decision cast doubt on whether Title VII prohibited" such distinctions, and Congress "'expressed its disapproval of both the holding and the reasoning'" of *Gilbert* when it enacted the PDA. App. 11a n.6. See also *id.* at 18a (the PDA "clarified" Title VII).[6] And, the majority held that AT&T was required to grant retroactive service credit. *Id.* at 21a. (AT&T should have "simply credited the applicable number of days to each plaintiff's NCS date when it calculated [their] benefits").

The Seventh Circuit also relied on this Court's decision in *Teamsters*, where this Court, interpreting § 703(h), "held that the fact that a seniority system perpetuates pre-Act discrimination does not preclude it from being *bona fide*." *Ameritech*, 220 F.3d at 823

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[6] Under settled law, *Gilbert* was the "authoritative statement of what the statute meant *before* as well as after" it was decided. *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added). Congress obviously disapproved of *Gilbert*, which is why it enacted the PDA. But to "clarify" that Title VII had *always* prohibited pregnancy discrimination, Congress would have had to give the PDA retroactive effect, which it did not do. *See infra*.

(citing *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 352-53 (1977)). The majority below deemed this "error," based on its view that the PDA carves out pregnancy discrimination from the immunity that § 703(h) otherwise affords to seniority systems. App. 23a-27a.

Finally, the Seventh Circuit concluded that, because the NCS system was nondiscriminatory, the plaintiffs' claims were time-barred. The *Ameritech* plaintiffs knew

> the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off. No later than the time when Ameritech amended its plan in response to the PDA, they knew that their NCS had not been amended. It is no secret to any employee that seniority rolls like Ameritech's NCS make a difference for a host of employee benefits, some present, and some future. Ameritech informed each employee periodically of his or her accrued NCS. The time for bringing a complaint was therefore long ago . . . .

Ameritech, 220 F.3d at 823; see also *Leffman*, 481 F.3d at 433. Every one of these observations applies here because, at the time the PDA was enacted, the plaintiffs here and in *Ameritech* were employees of the then-still unified Bell System. Yet, the majority below reasoned that, "[w]hile Pacific Bell [in *Pallas*, and AT&T here] may have used unlawful [NCS] calculations in many prior employment decisions, its denial of early retirement was a discrete independent act," and a claim brought within the charging period from that act is timely. App. 16a.

In short, the conflict could not be more complete or the outcomes more irreconcilable. As a result,

companies like AT&T that treated pre-PDA pregnancy leaves less favorably than other disability leaves and that have employees both within and outside the Ninth Circuit can be held liable under Title VII for relying on such pre-PDA decisions depending on where an employee files suit. Accordingly, the Court should grant the petition to provide a uniform rule for national employers and their workforces.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

This clear and acknowledged conflict is more than sufficient, by itself, to justify review. But review is all the more necessary because the majority's decision clearly departs from this Court's precedents. Indeed, because, as the dissent noted below, "[t]here is no meaningful basis for distinguishing *Evans* and this case," App. 49a, it is difficult to avoid the conclusion that the majority sought intentionally to evade *Evans*, notwithstanding *Ledbetter*'s recent reaffirmation of it.

In *Evans*, respondent resigned her job in 1968 due to a policy that prohibited female flight attendants from being married. *Evans*, 431 U.S. at 554. Although that policy was later found to violate Title VII, Evans never challenged it. After the policy was rescinded, she was re-hired in 1972, but United did not restore the seniority she had lost as a result of her resignation. *Id.* at 555.

In rejecting her Title VII claim, this Court agreed

> that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a [timely] charge of discrimination .... A discriminatory act which

> is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.

Id. at 558. Thus, United did not violate Title VII when its seniority system gave present effect to a past act that is no longer actionably discriminatory. And, its seniority system was not discriminatory because it did not "treat[ ] former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason." *Id.*

The relevant facts of this case are indistinguishable. The seniority systems at issue in *Evans* and here relied on historical facts (resignations in *Evans*, adjusted NCS dates here) caused by discriminatory policies (the "no marriage" policy in *Evans*, the treatment of pregnancy leaves as personal leave here). Under *Evans*, a seniority system can rely on these historical facts if the policies that produced them are no longer subject to challenge (or, as here, were legal at the time). Indeed, AT&T was entitled to treat its pre-PDA service calculations "as lawful" because those calculations were not merely "the legal equivalent of a discriminatory act which occurred before the statute was passed," they were acts that actually occurred before the PDA was passed. Finally, like United's seniority system, the NCS system does not treat women who took pre-PDA pregnancy leaves (and who, as a result, did not receive full service credit) any differently than it treats male and female employees who took personal leaves for other reasons and thus did not receive full service credit for those leaves.

Moreover, *Ledbetter* re-affirmed *Evans* in terms directly applicable here. It held that "[t]he fact that precharging period discrimination adversely affects

the calculation of a neutral factor (*like seniority*) that is used in determining future pay does not mean that each new paycheck constitutes a new violation." 127 S. Ct. at 2174 (emphasis added). If the words "benefits award" are substituted for "pay" and "paycheck," the foregoing quotation describes this case precisely.

The majority's attempts to distinguish *Evans* and *Ledbetter* do not withstand even cursory analysis. It held that *Evans* did not govern because "[AT&T] engages in intentional discrimination *each time it applies the policy* in a benefits calculation for an employee affected by pregnancy, even if the pregnancy occurred before the enactment of the PDA." App. 11a. *Evans* "would be controlling," the majority stated, "if [AT&T] credited neither pre-PDA pregnancy leave nor pre-PDA disability leave" when it made its benefits calculations. *Id.* at 9a n.4.

These arguments do not distinguish *Evans*; they ignore it. *Evans* is not controlling only where an employer *eliminates* the effects of its prior discrimination, which is what AT&T would be doing if, in making post-PDA benefit awards, it retroactively denied service credit to workers who took pre-PDA leaves for temporary disabilities other than pregnancy. The very reason Evans sued United was because it refused to restore seniority she lost as a result of the discriminatory "no marriage" policy. 431 U.S. at 555, 559 n.13. The fundamental holding in *Evans* is that the failure to remedy present effects of past discrimination is not a new act of intentional discrimination.

Indeed, for this reason, the majority's repeated statements that nothing prevented AT&T from crediting Hulteen in 1994 with service she had lost because of her pre-PDA pregnancy leave, App. 19a-

22a, are not merely irrelevant, they illustrate the majority's refusal to be faithful to *Evans*. This Court did not hold that Evans had failed to allege a current violation of Title VII because United "could not credit" her with the seniority she had lost. It ruled that United's refusal to restore that seniority was not a new act of discrimination.[7]

For many of these same reasons, the majority's reliance on *Bazemore* was entirely misplaced. In that case, this Court held that an employer committed a current violation of Title VII when it continued a practice (paying black workers lower salaries than similarly situated white workers) after Congress had outlawed that very practice by state employers in 1972. *Bazemore*, 478 U.S. at 395 (Brennan, J., joined by all other Members of the Court, concurring in part). Here, AT&T indisputably ceased its practice of treating pregnancy leaves differently than leaves for other temporary disabilities after the PDA prohibited that practice: AT&T "grants female employees who become pregnant after the enactment of the PDA full

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[7] Evidently recognizing this holding, the majority claimed AT&T did not merely give present effect to past discrimination but, when making eligibility decisions, "affirmatively cho[se] to apply 'the policy at the time' that the [pregnancy] leave occurred." App. 21a. This statement is flatly contradicted by the record. The parties stipulated that AT&T had discretion only to adjust NCS dates to correct errors or to comply with legal requirements, ER R 58 ¶ 104, not that it re-applied its pre-PDA leave policies to respondents when it made post-PDA benefit decisions. Indeed, respondents themselves argued only that AT&T had "discretion to adjust [their] NCS dates" but "refused to do so," and instead "chose to apply its facially discriminatory NCS system." Appellees Br. at 46-47. The parties expressly stipulated that "whether or not Snyder's NCS date was adjusted in the year 2000 *does not affect the outcome*." ER R 58 ¶ 63 n.1 (emphasis added).

NCS seniority credit on the same terms as employees who become temporarily disabled." App. 44a (O'Scannlain, J., dissenting). The majority imposed liability on AT&T for failing to *restore* service credit to women who took pre-PDA pregnancy leaves. But *Bazemore* itself makes clear that Title VII does not impose liability for such a failure. It stated that "recovery may not be permitted for pre-1972 [*i.e.*, pre-enactment] acts of discrimination." *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring).

Whether it reflects the continuing difficulty lower courts face in discerning the "subtle" line drawn by *Evans/Bazemore*, see *Ameritech*, 220 F.3d at 823, or an unwillingness to adhere to that line, the decision below should be reviewed and corrected by this Court. The nation's largest circuit court, encompassing some of the nation's most populous regions, has misconstrued this Court's precedents in an en banc ruling. To allow such a decision to stand will invite further confusion in this important area of discrimination law, and will subject employers in the Ninth Circuit to liability for conduct that this Court has repeatedly made clear is not actionable.

III. THE DECISION BELOW GIVES IMPERMISSIBLE RETROACTIVE EFFECT TO THE PREGNANCY DISCRIMINATION ACT.

Finally, this Court should grant the petition to determine whether the majority below gave the PDA an impermissible, retroactive effect. The sheer number of retroactivity cases this Court has considered since *Landgraf* attests to the continuing need for guidance in this important and difficult area of the law,[8] as does the division in the en banc court below.

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[8] *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Fernandez-Vargas v. Gonzalez*, 126 S. Ct. 2422 (2006); *Republic of Austria*

Moreover, the precise question of whether the majority applied the PDA retroactively is itself an important one. Thousands of women who received no or reduced service credit for pregnancy leaves they took in the 1970s will soon reach retirement age, and can (except in the Sixth and Seventh Circuits) raise precisely the same type of claim that the Ninth Circuit has now accepted in an en banc ruling.

As the dissent noted below, the majority sought to escape *Evans* and *Ledbetter* by repeatedly labeling the NCS system "facially discriminatory." That label, however, necessarily rests "on a retroactive application of the PDA." App. 45a. *Landgraf* established that a statute has retroactive effect if, among other things, it "creates a new obligation," "changes the legal consequences of acts completed before its effective date," or "gives a quality or effect to acts or conduct which they did not have . . . when they were performed," 511 U.S. at 269 n.23 (internal quotation marks omitted). As the majority construed it, the PDA has all of these consequences.

Prior to the PDA, AT&T could lawfully deny employees full service credit for time spent on pregnancy leave and adjust their NCS dates accordingly. Thus, the day *before* the PDA took effect, it was lawful to rely on such adjusted NCS dates when making pension and other seniority-based benefit decisions. Under the majority's reasoning, however, a decision to rely on that same NCS date for that

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v. *Altmann*, 541 U.S. 677 (2004); *INS* v. *St. Cyr*, 533 U.S. 289, 314-26 (2001); *Martin* v. *Hadix*, 527 U.S. 343 (1999); *E. Enters.* v. *Apfel*, 524 U.S. 498, 528-29 (1998) (plurality opinion); *Regions Hosp.* v. *Shalala*, 522 U.S. 448 (1998); *Lindh* v. *Murphy*, 521 U.S. 320 (1997); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997); *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 896-97 (1996); *Rivers*, 511 U.S. 298.

same purpose one day *after* the PDA took effect constitutes "facial discrimination" and is a "current" violation of the PDA. As the majority construed it, therefore, the PDA "create[d] a new obligation"—*i.e.*, it required AT&T to give full service credit for pre-PDA pregnancy leaves when, prior to the PDA's effective date, AT&T was under no such obligation. Similarly, under the majority's reading, the PDA "change[d] the legal consequences of acts completed before its effective date"—*i.e.*, service credit calculations that did not give rise to legal liability before the PDA do give rise to such liability now. And, as the majority construed it, the PDA "g[ave] a quality or effect to acts or conduct which they did not have . . . when they were performed"—*i.e.*, previously lawful NCS date calculations became unlawful.

Moreover, as the dissent explained below, the majority's reasoning confirms that it gave the PDA retroactive effect. It deemed the NCS system "not facially neutral" on the ground that "[t]he system distinguishes between *similarly situated* employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities." App. 9a (internal quotation marks omitted; emphasis added). Absent retroactive application of the PDA, however, these two groups were *not* "similarly situated": Employees in the latter group were entitled to accrue seniority for the duration of their pre-PDA disability leaves, while (under AT&T's lawful pre-PDA leave policies) employees in the former group (like employees who took personal leave to finish college) were not entitled to accrue seniority for the duration of their pre-PDA leaves. Only if the PDA retroactively invalidated the previously lawful

distinction between these two groups of employees can they be deemed "similarly situated."

The majority denied it was giving the PDA retroactive effect because every circuit to consider the question--including the Ninth Circuit itself—has held that the PDA applies only prospectively. See, *e.g.*, *Wambheim* v. *J.C. Penny Co.*, 642 F.2d 362, 363 n.1 (9th Cir. 1981) (Ninth Circuit case finding that PDA is prospective only); see also *supra* at 4 n.1 (collecting cases). But the result it reached and the reasoning it employed refute that claim. Indeed, the application of the PDA in this case squarely conflicts with the Seventh Circuit's application of the law on essentially identical facts. This Court should grant the petition to resolve this actual conflict, particularly as many courts will soon confront similar claims.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 04-16087

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,
Plaintiffs-Appellees,

v.

AT & T CORPORATION,
Defendant-Appellant.

Argued and Submitted En Banc Oct. 4, 2006.
Filed Aug. 17, 2007.

Appeal from the United States District Court
for the Northern District of California;
Martin J. Jenkins, District Judge, Presiding.
D.C. No. CV-01-01122-MJJ.

Before MARY M. SCHROEDER, *Chief Circuit Judge*, STEPHEN REINHARDT, DIARMUID F. O'SCANNLAIN, PAMELA ANN RYMER, MICHAEL DALY HAWKINS, SUSAN P. GRABER, M. MARGARET McKEOWN, KIM McLANE WARDLAW, WILLIAM A. FLETCHER, RAYMOND C. FISHER, RONALD M. GOULD, RICHARD A. PAEZ, MARSHA S. BERZON, JAY S. BYBEE, and CONSUELO M. CALLAHAN, *Circuit Judges*.

OPINION

WARDLAW, *Circuit Judge*, with whom Chief Judge SCHROEDER, Judges REINHARDT, HAWKINS, GRABER, McKEOWN, W. FLETCHER, FISHER, GOULD, PAEZ, BERZON join, and with whom Judge RYMER joins as to Part II-B:

This appeal presents an issue previously decided on virtually identical facts sixteen years ago in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050, 112 S.Ct. 916, 116 L.Ed.2d 815 (1992). There, we held that Pacific Bell violated Title VII in calculating retirement benefits after the effective date of the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k), when it gave service credit in those calculations for all pre-PDA temporary disability leave taken by employees except leave by reason of pregnancy. *Pallas*, 940 F.2d at 1326-27. Here, a three-judge panel of our court, in a now-withdrawn opinion, held that AT & T Corporation ("AT & T"), successor in interest to Pacific Bell and Pacific Telephone and Telegraph ("PT & T"), *did not* violate Title VII by engaging in identical conduct. The panel reasoned that *Pallas* no longer controlled because it was inconsistent with intervening Supreme Court authority governing retroactivity principles. *Hulteen v. AT & T Corp.*, 441 F.3d 653, 664 (9th Cir.2006) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). Because we conclude that *Pallas* is not "clearly irreconcilable" with intervening authority, *see Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), we affirm the district court's application of *Pallas* to the undisputed facts presented here and its award of summary judgment against AT

& T. We further hold that our conclusion in *Pallas* that calculation of service credit excluding time spent on pregnancy leave violates Title VII was, and is, correct.

I

Noreen Hulteen, Eleanora Collet, Linda Porter, Elizabeth Snyder and the Communications Workers of America, AFLCIO (collectively "Hulteen"), brought this suit to challenge AT & T's use of a facially discriminatory service credit policy to calculate employee pension and retirement benefits. Each of the individual plaintiffs took pregnancy leave between 1968 and 1976. They would have enjoyed more favorable benefits or retirement opportunities had they, at the time that they parted from AT & T, been given full service credit for their pre-PDA pregnancy leaves.

Congress passed the PDA in 1978. Amendments to the Civil Rights Act of 1964, Pub.L. No. 95-555, § 995, 92 Stat. 2076 (1978). The PDA clarified that Title VII prohibits discrimination "because of or on the basis of pregnancy, child-birth, or related medical conditions," as discrimination "because of sex." 42 U.S.C. § 2000e(k). The PDA further provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.* Thus, Title VII, as amended by the PDA, requires employers to accord women who take pregnancy leave the same benefits as employees who take other types of temporary disability leave.

From as early as 1914, AT & T, along with its predecessor companies PT & T and Pacific Bell, has used a Net Credited Service ("NCS") date to calculate employee benefits, including eligibility for early retirement and pension payment amounts. The NCS date is an employee's original hire date, adjusted forward in time for periods during which no service credit accrued. An earlier NCS date places an employee in a superior position for service-related determinations such as job bidding, vacation time and retirement benefits.

Before August 7, 1977, AT & T and its predecessor companies classified pregnancy leave as personal leave. An employee on personal leave received a maximum of thirty days NCS credit, whereas there was no limit on the amount of NCS credit for employees on temporary disability leave. Also, during that time, some female employees were forced to take pregnancy leave before the onset of pregnancy disability, even though other employees who anticipated a temporary disability could delay their leave until the onset of the disability. Employees on pregnancy leave who subsequently became temporarily disabled for reasons unrelated to pregnancy were ineligible for NCS credit beyond the thirty-day personal leave credit. By contrast, employees on temporary disability leave who suffered a new disability were eligible for NCS credit for the entire leave.

On August 7, 1977, PT & T adopted the Maternity Payment Plan ("MPP"). The MPP extended the maximum pregnancy NCS credit to thirty days before delivery and a maximum of six weeks after delivery. The MPP also allowed pregnant employees to work until the onset of the pregnancy disability. On April 29, 1979, the effective date of the PDA, PT & T

adopted the Anticipated Disability Plan ("ADP"). The ADP replaced the MPP and provided service credit for pregnancy leave on the same terms as other temporary disability leave. No service credit adjustments or changes to the NCS date were made for female employees who had taken pregnancy leave under either the MPP or the pre-1977 system. In 1984, ownership of PT & T was transferred to AT & T. The NCS credit calculation method described above remains in force at AT & T, notwithstanding AT & T's operations within the Ninth Circuit and our controlling decision in *Pallas*.

Noreen Hulteen retired involuntarily in 1994 as part of an AT & T reduction in force. She has 210 days of uncredited pregnancy leave that resulted in reduced pension benefits. Eleanora Collet retired voluntarily under an incentive program in 1998 with 261 days of uncredited pregnancy leave. Linda Porter is a current employee with seventy-three uncredited days from pregnancy leave and forced leave before the onset of her pregnancy disability.[1] Elizabeth Sny-

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[1] We have jurisdiction to entertain Porter's claim even though the illegal employment action—her calculation of benefits—is yet to occur. When a plaintiff seeks declaratory and injunctive relief, as Porter has here, ripeness is evaluated by examining "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941); *see also* 42 U.S.C. § 2000e-5(g)(1) (If an employer "is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [employer] from engaging in such unlawful employment practice."). Given AT & T's truculent refusal to credit employees for their pre-PDA pregnancy leave in its benefits calculations as it credits other disability leave (notwithstanding our decision in *Pallas*), Porter

der terminated her employment voluntarily in 2000, and has sixty-seven days of uncredited pregnancy and unrelated temporary disability occurring during her pregnancy leave. The AT & T plan administrator, in 2000, authorized a credit for Snyder's first thirty days of her 1974 pregnancy leave "as was the policy at the time," changing her NCS date from July 29, 1966 to June 29, 1966.[2]

Between 1994 and 2002, each woman filed a charge with the United States Equal Employment Opportunity Commission ("EEOC"). CWA likewise filed a charge of discrimination with the EEOC on behalf of its bargaining unit employees. The EEOC issued a Letter of Determination finding reasonable cause to believe that AT & T had discriminated against Noreen Hulteen "and a class of other similarly-situated female employees whose adjusted [NCS] date has been used to determine eligibility for a service or disability pension, the amount of pension benefits, and eligibility for certain other benefits and programs, including early retirement offerings." The EEOC also issued a Notice of Right to Sue to each of the four named plaintiffs and CWA.

Hulteen brought suit, alleging, inter alia, that AT & T violated Title VII in its calculation of NCS credit. On cross-motions for summary judgment, the parties stipulated to all of the material facts. Applying *Pallas*, the district court granted Hulteen's motion for summary judgment on the Title VII claim. AT & T

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faces a real and immediate threat of AT & T making discriminatory employment decisions based on her NCS date.

[2] The remaining appellee, Communications Workers of America ("CWA"), is the collective bargaining representative for the majority of AT & T's non-management employees.

timely appealed, and on March 8, 2006, a panel of our court reversed the district court, holding that *Pallas* gave "the PDA impermissible retroactive effect under controlling law today." *Hulteen*, 441 F.3d at 655. Judge Rymer dissented, arguing that because there appears to be "no acceptable basis . . . to overrule *Pallas*, and AT & T offers no reason for distinguishing it, . . . *Pallas* remains binding and controls disposition of this case." *Id.* at 670. A majority of the active judges of this court voted in favor of rehearing en banc. We consider the appeal anew.

II

We review de novo the district court's grant of summary judgment. *Qwest Commc'ns, Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir.2006). "We must determine, viewing the evidence in the light most favorable to [AT & T], the non-moving party, whether . . . the district court correctly applied the substantive law." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir.2004).

A

The district court correctly held that our decision in *Pallas* compels the conclusion that AT & T violated Title VII by failing to credit pre-PDA pregnancy leave when it calculated benefits owed Hulteen. Lana Pallas was a former Pacific Bell employee who took pregnancy leave before the PDA was enacted. *Pallas*, 940 F.2d at 1325. "In 1987, Pacific Bell instituted a new retirement benefit for management employees called the 'Early Retirement Opportunity.'" *Id.* at 1326. To qualify for the benefit, an eligible employee had to accrue twenty years of service as measured by the same NCS system applied to Hulteen. *Id.* Pallas was denied eligibility because a pregnancy-related

leave taken in 1972 deprived her of the necessary amount of service credit by some three or four days. *Id.*

The district court dismissed Pallas's Title VII sex discrimination claim for failure to state a claim, and we reversed. In doing so, we criticized reliance on the Supreme Court's decisions holding that challenges based on disparate impacts resulting from a facially neutral bona fide seniority system must be brought during a limitations period running from the date the system was adopted. *Id.* at 1326-27 (citing *Lorance v. AT & T Techs., Inc.*, 490 U.S. 900, 911, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989) (holding that "when a seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory *adoption* which triggers the limitations period") (emphasis in original), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557-58, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977)[3]).

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[3] Evans worked as a United Air Lines flight attendant for eighteen months, until she married in 1968 and was forced to resign pursuant to United's policy of prohibiting its female flight attendants from being married. 431 U.S. at 554, 97 S.Ct. 1885. While this policy was later found to violate Title VII, Evans was not a party to that suit. *Id.* at 554-55, 97 S.Ct. 1885. In 1972, four years after her resignation, United hired Evans as a new employee. *Id.* at 555, 97 S.Ct. 1885. Evans was not credited for her previous service pursuant to a new policy prohibiting prior seniority credit from being given to flight attendants, regardless of sex, if they resigned or their employment was "permanently severed for just cause." *Id.* at 555 n. 6, 97 S.Ct. 1885. Evans filed suit, seeking an award of seniority credit to 1966 and back pay lost because of United's discriminatory no marriage policy. *Id.* at 556 & n. 7, 97 S.Ct. 1885. The Court found United's 1972 policy was facially neutral because "both male and female employees who had service prior to February 1968, who resigned or were terminated . . . and who were later re-employed, also were

We found *Lorance* and *Evans* inapposite for two reasons. First, because the discriminatory program that gave rise to the lawsuit was instituted in 1987, Pallas's claim "could not have been brought earlier." *Id.*

Second, we concluded that, unlike the facially neutral seniority credit policy in *Evans*,

> the net credit system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women. The system distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.

Id. at 1327.[4] We therefore held, relying on *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), that Pacific Bell's decision to discriminate against Pallas in 1987 was actionable because "liability may be imposed" for a pre-Title VII discriminatory policy to the extent it is perpetuated in post-Title VII employment decisions. *Pallas*, 940 F.2d

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treated as new employees receiving no seniority credit for their prior service." *Id.* at 557, 97 S.Ct. 1885. The Court held that the application of the facially neutral policy, which gives present effect to the past discriminatory act of forced resignation for married female flight attendants in 1968, was not actionable. *Id.* at 558, 97 S.Ct. 1885.

[4] *Evans* would be controlling if Pacific Bell credited neither pre-PDA pregnancy leave nor pre-PDA disability leave when it made its early retirement determinations in 1987. The dissent, by blurring the distinction between facially neutral and facially discriminatory employment policies, inappropriately relies on *Evans*. *See* Dissent Op. at 10069-70.

at 1327(citing *Bazemore*, 478 U.S. at 395, 196 S.Ct. 3000 (Brennan, J., joined by all other Members of the Court, concurring in part) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.")).

The Court recently reaffirmed *Bazemore* in *Ledbetter v. Goodyear Tire & Rubber Co.*, --- U.S. ----, ---- - ----, 127 S.Ct. 2162, 2172-74, 167 L.Ed.2d 982 (2007).[5] The Court distinguished *Bazemore* on the basis of Ledbetter's failure to show that her disparate treatment was the result of intentional discrimination during the charging period. *Id.* at 2174. The Court reiterated that "a freestanding violation may always be charged within its own charging period regardless of its connection to other violations." *Id.* It explained *Bazemore* as holding:

> when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely

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[5] *Ledbetter*, as the Court's most recent pronouncement on Title VII, is relevant, but does not control this appeal. There, the Court considered whether an employee can recover for disparate pay received under a "facially nondiscriminatory and neutrally applied" policy, but which is the result of intentionally discriminatory pay decisions occurring outside the statutory filing period. 127 S.Ct. at 2174 (quoting *Lorance*, 490 U.S. at 911, 109 S.Ct. 2261). Here, we are concerned with an employer who made benefits calculations during the statutory filing period and under a seniority system that intentionally discriminates against women affected by pregnancy.

> be regarded as intending to discriminate on the basis of race as long as the structure is used.

Id. at 2173. *Pallas* is true to *Bazemore* and *Ledbetter:* Pacific Bell adopted a policy that calculates pregnancy leave differently than other temporary disability leave, and it engages in intentional discrimination *each time it applies the policy* in a benefits calculation for an employee affected by pregnancy, even if the pregnancy occurred before the enactment of the PDA. 940 F.2d at 1327; *accord Ledbetter*, 127 S.Ct. at 2173; *Bazemore,* 478 U.S. at 395, 106 S.Ct. 3000.

In *Pallas,* we did not address whether the PDA had retroactive effect because Pallas's complaint alleged that a post-PDA determination—the *calculation* of benefits after the PDA was enacted—discriminated against women on the basis of their pre-PDA pregnancy leaves.

B

AT & T admits that under *Pallas* its current conduct in calculating retirement benefits excluding pre-PDA pregnancy leave violates Title VII.[6] AT & T

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[6] We reject as disingenuous AT & T's argument that *Pallas* "clearly upset the settled expectations" that it would not be required to credit pre-PDA pregnancy leave in the same manner as temporary disability leave when it made post-PDA retirement and pension decisions. Title VII, enacted in 1964, prohibited employers from discriminating on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). Only one Supreme Court decision cast doubt on whether Title VII prohibited employers from discriminating on the basis of pregnancy: *General Electric Co. v. Gilbert*, 429 U.S. 125, 145-46, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) (upholding a policy that denied coverage of pregnancy-related disabilities in its disability benefits plan). "When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court

argued to our three-judge panel that *Landgraf* worked a "sea-change" in retroactivity principles. Thus, AT & T continued, *Landgraf* is intervening authority with which the decision in *Pallas* is "clearly irreconcilable," a retroactivity argument the panel majority embraced. However, as Judge Rymer's dissenting opinion ably points out, AT & T's *Landgraf* argument fails. We adopt Judge Rymer's reasoning:

> [We] read *Landgraf* as refining, rather than sea-changing, the landscape [,] for the Court explicitly drew upon Justice Story's "influential definition" of retroactivity in *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 766-69 (1814), to make clear how courts should determine whether a statute operates retroactively:
>
> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection

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in the *Gilbert* decision." *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983); *see id.* at 679, 103 S.Ct. 2622 (Many members of Congress "expressly agreed with the views of the dissenting Justices [in *Gilbert*]."). The PDA therefore did not alter Hulteen's or AT & T's rights or liabilities under Title VII, but corrected *Gilbert*'s erroneous interpretation of Title VII. *Id.* at 678-79 & n. 17, 103 S.Ct. 2622. Thus, *Pallas*, decided in 1991, could not have upset AT & T's "settled expectations."

between the operation of the new rule and a relevant past event.

. . .

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 268, 269-70, 280[114 S.Ct. 1483, 128 L.E.2d 229](internal citations omitted).

[We] do not believe that the reasoning or theory of *Pallas* is so irreconcilable with the reasoning or theory of *Landgraf* as to give [a three-judge] panel license to overrule it. *Pallas* held that the actionable conduct was PT & T's decision to discriminate against the employee on the basis of pregnancy when she applied for, and was denied, early retirement. The decision to deny benefits was made in the post-PDA world. As we emphasized in *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), if "the law changes the legal consequences of conduct that takes place after the law goes

> into effect, the law operates on that conduct prospectively." *Id.* at 814. This being the case, and assuming (without deciding) that Congress intended the PDA to have prospective effect only, *Pallas* was premised on a discrete act—the decision to deny a retirement benefit—that gave rise to a current violation of the PDA. Given *Pallas*'s finding of a current violation, the Act operated prospectively on *that* decision.

Hulteen, 441 F.3d at 666-67 (Rymer, J., dissenting).

Nor do we agree with AT & T's companion argument that *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996), *rev'g* 60 F.3d 616 (9th Cir.1995), a post-*Landgraf* decision, demonstrates that *Pallas* gave retroactive effect to the PDA. Again, we adopt Judge Rymer's analysis:

> *Spink* involved 1986 amendments to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §[§]621, 623(i)(1), and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1054(b)(1)(i), that prohibited employers from excluding new employees over age 60 from participating in their retirement plans. Spink had worked for Lockheed between 1939 and 1950, and began working there again in 1979 at the age of 61. He was excluded by Lockheed's retirement plan because he was over 60. After the 1986 amendments, Spink was allowed to participate in the plan, but was not credited with accrued benefits based on his years of service with Lockheed prior to the amendments' effective date. Spink sued. We held that denying credited service years that an older employee would otherwise have accumulated was unlawful under the amendments. In so doing, we observed that,

> "[t]o the extent our interpretation requires employers to include pre-enactment service years in calculating accrued benefits, it applies retroactively." 60 F.3d at 620, n.1. AT & T seizes upon this remark to maintain that when the Supreme Court reversed our conclusion that Congress intended the statute to have retroactive effect, it necessarily agreed that requiring employers to include pre-enactment service in calculating accrued benefits was a retroactive application. [We] cannot read so much into the *Spink* opinions. Our observation in *Spink I* did not affect our ultimate decision in that case because the decision was "based on the retroactive intent of the statute manifested in its text." *Id.* The Supreme Court simply disagreed with our construction of the statute. Thus, its analysis—like ours—was limited to *Landgraf*'s first step.

Hulteen, 441 F.3d at 667-68 (Rymer, J., dissenting).

Thus, *Landgraf* and *Spink* do not implicate, much less contradict, the twin holdings of *Pallas* that the NCS system is facially discriminatory and that the post-PDA decision as to Pallas's eligibility is the relevant, actionable discriminatory employment practice.

AT & T also asserts incorrectly that *Pallas* must be overruled because it relied upon the "continuing violation" doctrine abrogated in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114-15, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (holding an employee can only recover for discrete discriminatory acts that occur within the statutory filing period). As Judge Rymer explained:

> Neither the reasoning nor theory of *Morgan* is irreconcilable with *Pallas*. *Pallas* held that the

> NCS system is facially discriminatory, an issue that was not presented in *Morgan*. Morgan sought damages, which Pallas did not. Further, Morgan proceeded on the basis of a continuing violation, whereas Pallas relied upon PT & T's decision to deny benefits as the discrete act that was actionable. As the *Pallas* court saw it, this was a current violation, not a continuing one.

Hulteen, 441 F.3d at 668 (Rymer, J., dissenting). *Morgan* is also inapposite because, as in *Pallas*, it is undisputed here that the charges were filed with the EEOC within the statutory filing period after the denial of retirement benefits.

Moreover, our decision in *Pallas* is consistent with *Morgan*'s holding that "[t]he existence of past acts . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." *Morgan*, 536 U.S. at 113, 122 S.Ct. 2061. In *Morgan*, the Court listed "termination, failure to promote, denial of transfer, or refusal to hire" as examples of employment decisions that are discrete acts, and explained that each one, if decided in a discriminatory fashion, "constitutes a separate actionable 'unlawful employment practice.'" *Id.* at 114, 122 S.Ct. 2061; *see also Ledbetter*, 127 S.Ct. at 2169 (explaining "if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed"). While Pacific Bell may have used unlawful calculations in many prior employment decisions, its denial of early retirement was a discrete independent act. *See Pallas*, 940 F.2d at 1327. Because Pallas timely filed a charge, the existence of past acts would not bar her (or here, Hulteen's) suit under *Morgan* or *Ledbetter*.

A three-judge panel must follow a prior circuit decision unless a subsequent decision by a relevant court of last resort either effectively overrules the decision in a case "closely on point" or undercuts the reasoning underlying the circuit precedent rendering the cases "clearly irreconcilable." *Miller*, 335 F.3d at 899-900. Because *Pallas* is not irreconcilable with *Landgraf*, *Spink* or *Morgan*, it is well-settled law that the panel was required to either follow *Pallas* or make a sua sponte en banc call. *See, e.g., In re Complaint of Ross Island Sand & Gravel v. Matson*, 226 F.3d 1015, 1018(9th Cir.2000) (per curiam) ("[A]bsent a rehearing en banc, we are without authority to overrule [controlling circuit precedent].").

"[T]he important doctrine of *stare decisis* . . . permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (Yale Univ. Press 1960). The danger we create when we depart lightly from our precedent is underscored by AT & T's admission here, that even sixteen years after *Pallas* was decided, it continues to operate its NCS system in a discriminatory fashion because of "its belief that the PDA does not apply retroactively" and "in order to preserve its ability to litigate the issue in its own right." AT & T's litigation position rests on the assumption that our precedent

can be ignored. Because it cannot, we affirm the district court's summary judgment in favor of Hulteen.[7]

III

A plain reading of Title VII supports the legal conclusion reached in *Pallas*. By passing the PDA, Congress clarified that discrimination "because of sex" under Title VII included discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). It further added the requirement that employers treat "women affected by pregnancy . . . the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." *Id.*

In interpreting this additional requirement, we must begin with the text of the statute. Where congressional intent "has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 73

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[7] AT & T also argues that *Pallas* should not be followed because it failed to cite and follow the purportedly controlling decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ("*IBT*"). AT & T argues that *IBT* forecloses Pallas's claim because the Court construed 42 U.S.C. § 2000e-2(h) as immunizing neutral seniority systems from challenge. *Id.* at 352-53, 97 S.Ct. 1843. We disagree. In *Pallas*, we cited *Lorance* which not only cited *IBT*, but also distinguished facially neutral from facially discriminatory seniority systems. *Lorance*, 490 U.S. at 905, 909, 911-12, 109 S.Ct. 2261. *Pallas* found the NCS system facially discriminatory because it treated similarly situated employees differently if the female employee took a pre-PDA pregnancy-related disability leave. *Pallas*, 940 F.2d at 1327.

L.Ed.2d 973 (1982) (internal quotation omitted). And when "the meaning of the words seems to us to be intelligible upon a simple reading, . . . we shall spend no time upon generalities concerning the principles of [statutory] interpretation." *United States v. M.H. Pulaski Co.*, 243 U.S. 97, 106, 37 S.Ct. 346, 61 L.Ed. 617 (1917).

The ordinary meaning of "affected" is "[a]cted upon, influenced, or changed." *The American Heritage Dictionary of the English Language* 28 (4th ed.2000); *see also Black's Law Dictionary* 62 (8th ed.2004) (defining "affect" as "[m]ost generally, to produce an effect on; to influence in some way"). Applying the ordinary meaning of the term "affected" here leads to the conclusion that although Hulteen was affected by pregnancy when she took pregnancy leave, she was again "affected by pregnancy" when AT & T calculated her retirement benefits in 1994, deliberately choosing to use an NCS date that would deprive her of benefits received by those who were not "affected by pregnancy" by excluding her earlier pregnancy leave from the later calculation of benefits. It was well within AT & T's ability and control to calculate Hulteen's benefits in 1994 giving her service credit for the time she spent on pregnancy leave, and to thus avoid violating the PDA. AT & T simply chose to continue its systematic discrimination against women, based on pregnancy, even after Congress made it illegal.

In 1991, Congress amended the Civil Rights Act to make it clear, if *Pallas* had not already done so, that an employer who adopts a seniority system for an intentionally discriminatory purpose commits an unlawful employment practice "when the seniority system is adopted, when an individual becomes

subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, 1078-79(Nov. 21, 1991). Congress thus clarified that injury occurs at the time that the seniority system is applied to the aggrieved party because that is when the employee is actually harmed by the deprivation of benefits. *See* 42 U.S.C. § 2000e-5(e)(2). As the House Report accompanying the amendment noted, this amendment was intended to "overrule[ ] *Lorance* and permit[ ] person[s] to challenge discriminatory employment practices when those practices actually harm them." H.R. REP. NO. 102-40, pt. II, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 695. Congress was concerned that, "[t]aken to its logical conclusion, the *Lorance* rule would bar all challenges to present day applications of discriminatory practices in existence when Title VII became law since, under the *Lorance* rule, the deadline for a timely charge would have expired before Title VII became effective." *Id.* at 23, *reprinted in* 1991 U.S.C.C.A.N. 694, 716. The Supreme Court recently acknowledged that this amendment was targeted at *Lorance* and designed to "allow[ ] Title VII liability [to arise] from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application." *Ledbetter,* 127 S.Ct. at 2169 n. 2.

AT & T applied its discriminatory seniority system to Hulteen in 1994, causing her to be deprived of early retirement benefits and thus injuring her. AT & T never asserted that it could not credit Hulteen with pregnancy leave when it denied and/or calculated her benefits. Indeed, AT & T and Hulteen stipulated not only to the number of days each plaintiff was pen-

alized within the charging period for past pregnancies but also to AT & T's ability to add service credit to an employee's length of service. Instead of engaging in its discriminatory calculation and defending the EEOC charge and this litigation, AT & T could have simply credited the applicable number of days to each plaintiff's NCS date when it calculated her benefits.

AT & T, in fact, credited plaintiff Elizabeth Snyder thirty days from her 1974 pregnancy leave in 2000. In a March 1, 2000 letter, Pension Plan Administrator Michael L. Brown stated:

> In preparing your claim for service credit for the period of your maternity leave of absence for review by the Employees' Benefit Committee, it was determined that you were not given service credit for the first 30 calendar days of your leave (as was the policy at the time).
>
> Therefore, I have authorized the Pension Service Center to adjust your Net Credited Service date by 30 days.

The Pension Service Center, on March 29, 2000, notified Snyder that "[a]fter a careful review of [her] service record history," her NCS date had been adjusted from July 29, 1966 to June 29, 1966. These letters demonstrate that in its determination of benefits, AT & T does not simply rely on pre-PDA NCS calculations. Rather, when AT & T determines benefits eligibility, it reviews an employee's entire work history and affirmatively chooses to apply "the policy at the time" that the leave occurred. Any assertion that the violations here are continuing effects of pre-PDA discrimination and thus "unfortunate event[s] in history which [have] no present legal consequences" is belied by this record. *Led-*

better, 127 S.Ct. at 2168 (quoting *Evans*, 431 U.S. at 558, 97 S.Ct. 1885). That AT & T's practice of applying the discriminatory pre-PDA policies constitutes a separate and actionable act of discrimination is "too obvious to warrant extended discussion." *Ledbetter*, 127 S.Ct. at 2173 (quoting *Bazemore*, 478 U.S. at 395, 106 S.Ct. 3000).

AT & T asks us, sitting en banc, to overrule *Pallas* and follow the Seventh Circuit's approach in *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir.2000).[8] We decline to do so. The Seventh Circuit's analysis in *Ameritech* is problematic because, although it mentioned the Civil Rights Act of 1991, it failed to actually apply it.

In *Ameritech*, the Seventh Circuit considered a claim nearly identical to Pallas's and Hulteen's made by two women who filed a charge with the EEOC when, due to an NCS system that, like Pacific Bell's and AT & T's here, failed to credit time spent on pregnancy leave, they were denied early retirement

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[8] In *Ameritech*, decided nine years after *Pallas*, the Seventh Circuit created an inter-circuit conflict over this issue without citing *Pallas*. Since then, the Eighth Circuit has rejected an analysis similar to that found in *Ameritech*. *Cf. Maki v. Allete, Inc.*, 383 F.3d 740, 742-45 (8th Cir.2004) (holding that pension benefits calculated post-PDA using past discriminatory marriage and pregnancy policies violated Title VII, rejecting arguments that application of the PDA was impermissibly retroactive and timebarred because the discriminatory act occurred when the "pension benefits vested" and the "discriminatory provision . . . was applied to each plaintiff"). In *Maki*, as in *Pallas* and here, the policy at issue was facially discriminatory. The dissent would have us disregard a well-reasoned decision by the Eighth Circuit in favor of the Seventh Circuit's *Ameritech* decision, which erroneously failed to apply the very legislation it purported to interpret. *See* Dissent Op. at 10059 n. 7.

benefits in 1994. *Id.* at 817-18. The Seventh Circuit found that Ameritech's NCS system was a seniority system because it calculated "relative lengths of employment." *Id.* at 823(citing *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 606, 100 S.Ct. 814, 63 L.Ed.2d 55 (1980)). It next incorrectly concluded that the time of injury provisions of § 2000e-5(e)(2) were inapplicable because the plaintiffs failed to "show the kind of intentional discrimination that would trigger [this] exception to the statutory protection afforded to [bona fide] seniority systems [under 42 U.S.C. § 2000e-2(h)]." *Id.* However, as we explained in *Pallas*, the NCS system "facially discriminates against pregnant women [because it] distinguishes between similarly situated employees." 940 F.2d at 1327. Facial discrimination is "by its very terms" intentional discrimination. *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir.2002); *see also UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991) (holding "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"). The Seventh Circuit should have applied § 2000e-5(e)(2) to the *Ameritech* facts, which would have led it to the ineluctable conclusion that Ameritech had committed an unfair employment practice in 1994 when it denied early retirement benefits.

The Seventh Circuit compounded its error by also concluding that the system was immunized from challenge as an unlawful employment practice by 42 U.S.C. § 2000e-2(h), because a seniority system that perpetuates pre-PDA discrimination can nevertheless be a bona fide system, *id.* at 823 (citing *IBT*, 431 U.S. at 352-53, 97 S.Ct. 1843), and thus nonactionable under § 2000e-2(h) of Title VII.

Section 2000e-2(h) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . . It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. § 2000e-2(h).[9] Under this section, unintentional discriminatory effects resulting from bona fide seniority systems are exempted from Title VII's definition of an unlawful employment practice. What the Seventh Circuit failed to note in *Ameritech* is that the PDA, which was subsequently enacted to prohibit sex discrimination based on pregnancy, also expressly provides that "nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k). Thus, the *Ameritech* decision runs contrary to this express legislative directive.

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[9] The statutory language, "[i]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29," is also known as the "Bennett Amendment."

Neither the Supreme Court nor we have analyzed the interaction of these two Title VII provisions.[10] By beginning § 2000e-2(h) with the phrase "[n]otwithstanding any other provision of this subchapter," Congress broadly exempted bona fide seniority systems from Title VII's coverage. However, in enacting the PDA in 1978, Congress could not have been more clear in expressing its intent to limit the scope of the bona fide seniority system exemption, when it stated that "nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k). A later-enacted specific amendment, like the PDA, alters an earlier broad provision of the statute when the amendment states that it should control. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. This is particularly so where the scope of the earlier statute is broad but the subsequent statute[ ] more specifically address[es] the topic at hand.") (internal citation and quotations omitted); *cf. Morton v. Mancari*, 417 U.S. 535, 545-50, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (refusing to find an implied repeal of part of Title VII "in the absence of some affirmative showing of an intention to re-

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[10] Section 2000e(k) post-dates *Evans* and *IBT*. Nor was it construed in any of the Supreme Court decisions concerning timeliness under Title VII. *See Ledbetter*, 127 S.Ct. at 2165-66 (sex-based salary discrimination); *Morgan*, 536 U.S. at 104, 122 S.Ct. 2061 (race discrimination); *Lorance*, 490 U.S. at 901-05, 109 S.Ct. 2261 (seniority policy that had a disparate impact on women unrelated to pregnancy); *Bazemore*, 478 U.S. at 387, 106 S.Ct. 3000 (race-based salary discrimination).

peal"). We agree with the dissent that Congress knows how to specifically carve out exceptions in Title VII. *See* Dissent Op. at 10075-76. If Congress merely wanted to prevent the Bennett Amendment from being used to justify pregnancy-based discrimination, it could have tailored § 2000e(k)'s exception to cover only the Bennett Amendment instead of broadly excepting all of § 2000e-2(h).

Further, although Congress did not amend the text of § 2000e-2(h) in its 1978 amendments, it unequivocally expressed a policy that the bona fide seniority system exemption will not immunize employers from liability for seniority systems that discriminate based on pregnancy. "'[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it has not been expressly amended.'" *Brown & Williamson Tobacco Corp.*, 529 U.S. at 143, 120 S.Ct. 1291 (second alteration in original) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31, 118 S.Ct. 1478, 140 L.Ed.2d 710 (1998)). The express text of, as well as the policy embodied in, the PDA thus preclude the application of § 2000e-2(h) in pregnancy discrimination suits under Title VII. Any argument predicated upon a supposed contrary legislative intent argument is thus irrelevant to the proper analysis. "[I]t is well-settled that 'reference to legislative history is inappropriate when the text of the statute is unambiguous.'" *United States v. Sioux*, 362 F.3d 1241, 1246 (9th Cir.2004) (quoting *HUD v. Rucker*, 535 U.S. 125, 132, 122 S.Ct. 1230, 152 L.Ed.2d 258 (2002)).

Therefore, the Seventh Circuit in *Ameritech* misconstrued the PDA when it held that § 2000e-2(h) shielded Ameritech from liability for its facially

discriminatory practices.[11] We will not follow a decision that ignores a central provision of the PDA while purporting to apply it.

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[11] The Sixth Circuit recently adopted part of *Ameritech's* analysis in *Leffman v. Sprint Corp.*, 481 F.3d 428 (6th Cir.2007). Leffman was found ineligible for Special Early Retirement benefits in 2000 because of an uncredited pregnancy leave taken in 1976. *Id.* at 429. The court affirmed the district court's grant of summary judgment in favor of Sprint, relying on *Evans, id.* at 431-32, and *Ameritech, id.* at 433. The court failed to discuss the 1991 Civil Rights Amendments, however, and concluded that Leffman's claim was time-barred. *Id.* at 433(citing *Sawchik v. E.I. DuPont Denemours & Co.*, 783 F.2d 635, 638 (6th Cir. 1986)). The court made the same error as the Seventh Circuit in *Ameritech,* relying on § 2000e-2(h) without acknowledging that the PDA had carved out pregnancy discrimination from that exemption. *Id.* at 430-31. Finally, the court inexplicably justified its decision with the flawed conclusion that Sprint did not discriminate at all because it treated non-credited maternity leave like other non-credited leave. *Id.* at 433. This comparison was inapt because, in 1976, Sprint employees received credit for time spent on sick or disability leave for reasons other than pregnancy. The *Leffman* court missed the point that if Leffman had been allowed to take sick or disability leave for her 1976 pregnancy disability, she would have qualified for early retirement benefits in 2000 like other employees who received credited leave time when they were similarly unable to work for reasons other than pregnancy. *See Leffman v. Sprint Corp.*, No. 3:04CV7222, 2006 WL 144549, at *1-2 (N.D.Ohio Jan.18, 2006). The dissent employs similarly faulty logic to conclude Hulteen cannot show intentional discrimination because AT & T's benefits calculation was made pursuant to her NCS date. *See* Dissent Op. at 10069. Like Leffman's, Hulteen's benefits would have been greater if AT & T had chosen when it calculated her retirement benefits post-PDA to treat her pre-PDA pregnancy leave the same as pre-PDA disability unrelated to pregnancy leave.

IV

The district court properly applied our decision in *Pallas* to conclude that AT & T's post-PDA benefits calculations violated the PDA. *Pallas* was, and remains, good law. We therefore affirm the district court's summary judgment in favor of Hulteen, Collet, Porter, Snyder and CWA on their Title VII sex discrimination claims.

AFFIRMED.

O'SCANNLAIN, *Circuit Judge*, with whom Judges RYMER, BYBEE, and CALLAHAN join, dissenting:

By concluding that *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir.1991), *cert. denied*, 502 U.S. 1050, 112 S.Ct. 916, 116 L.Ed.2d 815 (1992), remains good law, the majority erroneously perpetuates a circuit split with the Sixth and the Seventh Circuits.[1] I believe that *Pallas* was wrong then and is wrong now. Because this en banc court can and should overrule *Pallas* and follow the Seventh Circuit's well-reasoned decision in *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir.), *cert. denied*, 531 U.S. 1127, 121 S.Ct. 883, 148 L.Ed.2d 791 (2001), I must respectfully dissent from the majority's conclusion that the sex discrimination claims in this case are timely.[2]

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[1] *Compare Pallas*, 940 F.2d at 1327, *with Ameritech Benefit Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814 (7th Cir.2000), *and Leffman v. Sprint Corp.*, 481 F.3d 428, 433 (6th Cir.2007). No circuit has followed our decision in *Pallas*.

[2] The majority devotes considerable attention to whether intervening Supreme Court authority is "clearly irreconcilable" with our prior decision in *Pallas*. *Ante*, at 10037-43. That standard governs whether a three-judge panel of our court is free to reexamine the holding of prior circuit precedent. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.2003) (en banc). Here, of course, we sit as an en banc court. If *Pallas* is wrongly decided, we are free to overrule it even if subsequent authorities are not "clearly irreconcilable." *See id.* at 902 (O'Scannlain, J., concurring in part) ("The en banc court, however, is unencumbered by any obligation to follow the decision of a three-judge panel, and therefore is free to do what ... [a] panel could not."); *see also Robbins v. Carey*, 481 F.3d 1143, 1149 n. 3 (9th Cir.2007) ("Ordinarily, panels cannot overrule a circuit precedent; that power is reserved to the circuit court sitting en banc."). I turn directly to that inquiry.

I

At the core of this dispute is AT & T Corporation's ("AT & T")[3] Net Credit Service ("NCS") seniority system, a concept which is not defined in Title VII. *See Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 605, 100 S.Ct. 814, 63 L.Ed.2d 55 (1980). The term "seniority" connotes length of employment. *Id.* "A 'seniority system' is a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *Id.* at 605-06, 100 S.Ct. 814 (footnotes omitted). "[T]he principal feature of any and every 'seniority system' is that preferential treatment is dispensed on the basis of some measure of time served in employment." *Id.* at 606, 100 S.Ct. 814. "In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions." *Id.* at 607, 100 S.Ct. 814. "[E]very seniority system must include ancillary rules that delineate how and when the seniority time clock begins ticking," as well as other provisions that "define which passage of time will 'count' towards the accrual of seniority and which will not." *Id.*

AT & T has such a seniority system. Pursuant to that system, AT & T maintains an NCS date for each employee (from the initial date of hire until the date of termination) that consists of that employee's original hire date and any adjustments for periods during which no service credit is accrued pursuant to

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[3] For sake of convenience, I refer throughout this dissent to the employer as AT & T, even though AT & T was a successor in interest to Pacific Telephone and Telegraph ("PT & T") after the former Bell system was broken up in 1984. The difference in corporate identity does not affect the outcome of this case.

ancillary rules. AT & T moves the NCS date forward to "squeeze out" the periods of leave or breaks in service that are not credited, resulting in a later NCS date. AT & T uses the NCS date that it maintains for each employee for purposes of determining retirement benefits and other employment benefits. An earlier NCS date places an employee in a comparatively better position for employment-related determinations, including job bidding, layoffs, and eligibility for and calculation of certain retirement benefits.

Prior to August 7, 1977, AT & T's seniority system included two ancillary rules important to this case. The first provided that an employee received only 30 days of NCS credit for personal leave, but received full credit for temporary disability leave. The second specified that pregnancy leave would be treated as personal leave. AT & T applied these two rules to calculate NCS dates for all employees who became pregnant prior to that date. At no time did AT & T apply the pregnancy leave rule to any employee who became pregnant on or after August 7, 1977. With one exception,[4] the record fails to establish that on or after August 7, 1977, AT & T applied the pregnancy leave rule in effect before that date to adjust or to recalculate any employee's NCS date.

On August 7, 1977, AT & T adopted the Maternity Payment Plan ("MPP"), which supplanted the prior pregnancy leave rule. According to the MPP's new rule, up to six months of pregnancy leave would be treated as disability leave with full NCS credit, and

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[4] In 2000, AT & T credited Elizabeth Snyder's NCS seniority with 30 days because the previous NCS date mistakenly had not been adjusted earlier for her pregnancy leave in 1974. *See infra* pp. 10067-68.

any pregnancy leave in excess of six months would be treated as personal leave with a maximum of 30 days of NCS credit. Employees on non-pregnancy related disability leave continued to receive full NCS credit. AT & T applied the MPP pregnancy leave rule to adjust the NCS dates for all employees who became pregnant before April 29, 1979; AT & T did not retroactively apply the MPP pregnancy leave rule to adjust the NCS dates for any employees who became pregnant before August 7, 1977. The record fails to demonstrate that AT & T applied the MPP pregnancy leave rule to adjust or to recalculate any employee's NCS date on or after April 29, 1979.

In response to the Pregnancy Discrimination Act of 1978 ("PDA"), Pub.L. No. 95-555, 92 Stat. 2076, on April 29, 1979 (the effective date of the PDA), AT & T adopted the Anticipated Disability Plan ("ADP"), which superseded the MPP pregnancy leave rule. The ADP provided that pregnancy leave would be treated as disability leave with full NCS credit for the entire period of pregnancy. The ADP pregnancy leave rule remains in effect in AT & T's current NCS seniority system. AT & T applies the new ADP pregnancy leave rule to adjust the NCS dates for all employees who become pregnant on or after April 29, 1979. AT & T, however, made no adjustment to the NCS dates for employees who had been subject to the MPP pregnancy leave rule or the pre-1977 pregnancy leave rule. Thus, for example, an employee who took pregnancy leave in 1980, after the effective date of the PDA, would receive full NCS seniority credit for that period of leave, but no adjustments were made to the NCS date of an employee who took pregnancy leave in 1976 and received a maximum of 30 days NCS seniority credit, or who took pregnancy leave in

1977 and received a maximum of six months and 30 days of credit.

Noreen Hulteen, Eleanora Collect, Linda Porter, and Elizabeth Snyder are all female employees of AT & T who took pregnancy leaves between 1968 and 1976, before the enactment of the PDA.[5] Under AT & T's NCS seniority system in effect at that time, Hulteen, Collect, Porter, and Snyder received only partial NCS credit for their pregnancy leaves, resulting in a later NCS date. AT & T's subsequent calculation of their benefits or the dates of their retirement eligibility between 1994 and 2000, would have been more favorable had AT & T retroactively credited their NCS dates for the previously uncredited periods of pregnancy leave before the enactment of the PDA. They contend that AT & T discriminated on the basis of sex in violation of Title VII when AT & T determined their benefits based on the NCS dates that were unadjusted to account for uncredited pre-PDA pregnancy leave.

II

A

Title VII of the Civil Rights Act of 1964, Pub.L. No. 88-352, 78 Stat. 241, makes it an "unlawful employment practice" for any employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

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[5] For the sake of convenience, I will focus specifically on Hulteen's sex discrimination claim throughout the dissent. Except where expressly noted, the reasoning with respect to that claim applies equally to the other employees' claims.

In *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), the Supreme Court held that discrimination based on pregnancy was not discrimination within the meaning of Title VII. *Id.* at 145-46, 97 S.Ct. 401. There, General Electric adopted an employee disability benefit plan that paid weekly nonoccupational sickness and accident benefits. *Id.* at 127, 97 S.Ct. 401. However, General Electric excluded from that plan's coverage disabilities arising from pregnancy. *Id.* The specific issue before the Court was whether Title VII prohibited excluding pregnancy-related disabilities from an employer's disability benefit plan. The Supreme Court recognized that pregnancy is confined to women, but reasoned that the disability benefit plan did not discriminate in violation of Title VII by excluding pregnancy-related disabilities from its coverage:

> The Plan, in effect (and for all that appears), is nothing more than an insurance package, which covers some risks but excludes others. The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not

> result simply because an employer's disability-benefits plan is less than all-inclusive.

Id. at 138-39, 97 S.Ct. 401 (internal citations and footnote omitted).

In 1978, in response to *Gilbert,* Congress passed the Pregnancy Discrimination Act of 1978, Pub.L. No. 95-555, 92 Stat. 2076, which became effective on April 29, 1979,[5] and amended Title VII to define "because of sex" or "on the basis of sex" to include discrimination based on pregnancy. 42 U.S.C. § 2000e(k). The PDA states in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

Id.

An individual must file charges of discrimination under Title VII within 180 days "after the alleged unlawful employment practice occurred," unless the

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[5] "The amendment to Title VII became effective on the date of its enactment, October 31, 1978, but its requirements did not apply to any then-existing fringe benefit program until 180 days after enactment—April 29, 1979." *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 671 n. 2, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983).

employee has first instituted proceedings with a state or local agency, in which case the period is extended to 300 days. 42 U.S.C. § 2000e-5(e)(1). The dispositive issue in this case is whether Hulteen timely filed a sex discrimination action within the specified period of limitations.

As the Supreme Court has repeatedly stressed, we must "identify with care the specific employment practice that is at issue" when determining whether the sex-discrimination action is timely. *Ledbetter v. Goodyear Tire & Rubber Co.*, --- U.S. ----, ----, 127 S.Ct. 2162, 2167, 167 L.Ed.2d 982 (2007) (citing *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 110-11, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)); *see also Delaware State College v. Ricks*, 449 U.S. 250, 257, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). There are three possible candidates in this case: (1) AT & T's *adoption* of its pregnancy leave rules before the enactment of the PDA; (2) AT & T's *application* of those leave rules to adjust Hulteen's NCS date before the enactment of the PDA; and (3) AT & T's *calculation* of Hulteen's retirement benefits in 1994 based, in part, on the NCS date it consistently maintained for her without retroactively adjusting that date for pre-PDA pregnancy leave. The time to challenge the first and second possible employment practices, however, has long since expired. Accordingly, relying on our prior decision in *Pallas*, Hulteen points us to the third alternative employment practice in 1994 when AT & T declined to grant retroactive NCS credit for pre-PDA pregnancy leave before it calculated her retirement benefits.

Accepting Hulteen's argument that such calculation in 1994 constituted a new and current violation of Title VII, the majority holds that her Title VII

action is timely. In so concluding, the majority perpetuates *Pallas*'s error by breathing new life into an expired sex discrimination claim. On virtually identical facts, the Seventh Circuit reached the opposite conclusion in *Ameritech*.[7] Because I believe the Seventh Circuit's decision faithfully applies controlling Supreme Court precedents and the relevant provisions of Title VII, I would follow that court's reasoning.

III

"The outcome of this case," as the Seventh Circuit recognized, "turns on which of two competing lines of authority provide a better 'fit' here." *Ameritech*, 220 F.3d at 822. The Seventh Circuit followed *United Air Lines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and its progeny. In *Pallas*, on the other hand, this court followed *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (per curiam). Because the majority follows *Pallas* today, the *Bazemore* and *Evans* line of cases deserve careful attention.

A

In *Bazemore*, the North Carolina Agricultural Extension Service ("Service") maintained two separate, racially segregated work forces and paid black employees less than white employees prior to the enact-

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[7] The majority contends that in *Maki v. Allette, Inc.*, 383 F.3d 740 (8th Cir.2004), the Eighth Circuit rejected an analysis similar to that found in *Ameritech*. *Ante*, at 10047 n. 8. But that case is quite different from *Ameritech* and the one before us today. Unlike in *Maki*, Hulteen has not established that, after the enactment of the PDA, AT & T adopted a new seniority rule to bridge prior periods of employment for an intentionally discriminatory purpose.

ment of Title VII. 478 U.S. at 390-91, 106 S.Ct. 3000 (Brennan, J., joined by all other Members of the Court, concurring in part). After the enactment of Title VII, the Service integrated the workforce, but the pay disparity between black employees and white employees in the same positions remained. *Id.* The Supreme Court held that the Service was not liable for the discriminatory acts that occurred prior to the enactment of Title VII and therefore "recovery may not be permitted for [pre-Title VII] acts of discrimination." *Id.* at 395, 106 S.Ct. 3000. However, the Supreme Court concluded that the pay disparity that remained after the enactment of Title VII was unlawful because "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96, 106 S.Ct. 3000.

B

1

The Supreme Court's decision in *Evans* represents the fountainhead for the competing line of authority. In *Evans,* United Air Lines ("United") maintained a policy of refusing to allow its female flight attendants to be married. 431 U.S. at 554, 97 S.Ct. 1885. Evans married in 1968 and therefore was forced to resign pursuant to United's no-marriage policy. *Id.* Previously, the Seventh Circuit held that United's policy violated Title VII. *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971). Evans, however, was not a party to *Sprogis* and failed to initiate any proceedings against United within the period of limitation for that past act of discrimination. *Evans,*

431 U.S. at 555, 97 S.Ct. 1885. After United ended the no-marriage policy, United rehired Evans in 1972 as a new employee, but refused to give her seniority credit for any prior service with United. *Id.* Evans conceded that it was too late to bring an action for her forced termination, but asserted that "United [was] guilty of a present, continuing violation of Title VII and therefore that her claim is timely." *Id.* at 557, 97 S.Ct. 1885.

Evans argued that "the seniority system gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557, 97 S.Ct. 1885. Rejecting that argument, the Court emphasized that "United's seniority system *does* indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *Id.* at 558, 97 S.Ct. 1885 (first emphasis added). Concluding that none did, the Court explained that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . . . [I]t is merely an unfortunate event in history which has no present legal consequences." *Id.* at 558, 97 S.Ct. 1885.

2

The Supreme Court again embraced *Evans*'s reasoning in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431. In that case, Delaware State College denied Ricks, an African American librarian, academic tenure in March 1974. *Id.* at 252, 101 S.Ct. 498. Adhering to its policy of not discharging immediately a junior faculty member who did not receive tenure, the College offered Ricks

a nonrenewable one-year "terminal" contract that would expire on June 30, 1975, with explicit notice that his employment would end on that date. *Id.* at 253. Ricks filed an employment discrimination charge against the College in April 1975, alleging, *inter alia*, that the College unlawfully discriminated against him on the basis of race in violation of Title VII. *Id.* at 255, 101 S.Ct. 498.

Ricks argued that the period of limitations ran from the date that his one-year terminal contract expired rather than the date when the College denied tenure. *Id* at 257, 101 S.Ct. 498. Rejecting Ricks's argument, the Supreme Court held that his claim for discrimination in violation of Title VII was untimely. *Id.* at 256, 101 S.Ct. 498. The Court concluded that "the only alleged discrimination occurred—and the filing limitations period therefore commenced—at the time the tenure decision was made and communicated to Ricks . . . . even though one of the *effects* of the denial of tenure—the eventual loss of a teaching position—did not occur until later."[8] *Id.* at 258, 101 S.Ct. 498. The Supreme Court emphasized that "[i]t is simply insufficient for Ricks to allege that his termination 'gives present effect to the past act and therefore perpetuates the consequences of forbidden discrimination.'" *Id.* (quoting *Evans*, 431 U.S. at 557, 97 S.Ct. 1885).

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[8] I note that, according to the parties' joint stipulation of facts, Hulteen (as well as the other plaintiffs) knew that AT & T granted only partial NCS credit at the time of her pre-PDA pregnancy leave, was aware that her unadjusted NCS seniority dated traveled with her from PT & T to AT & T in 1984, and periodically received documents throughout her employment containing the unadjusted NCS seniority date. *See also Led better*, 127 S.Ct. at 2177 & n. 10.

The Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, --- U.S. ----, 127 S.Ct. 2162, 167 L.Ed.2d 982, confirms this understanding of the *Evans* line of authority. Ledbetter worked for Goodyear Tire and Rubber Company ("Goodyear") from 1979 until 1998. *Id.* at 2165. Goodyear maintained a policy during that time of granting or denying raises for salaried employees based on their supervisors' evaluations of their performance. *Id.* In 1998 Ledbetter brought an action against Goodyear, asserting, among other claims, a Title VII pay discrimination claim. *Id.* At trial, she "introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment." *Id.* at 2165-66. The evidence also established that Ledbetter was earning significantly less than her male counterparts at the end of her career. *Id.* at 2166.

Ledbetter argued that her action was timely, pointing to two different employment practices during the applicable period of limitation as possible candidates. *Id.* at 2167. First, she argued that each paycheck issued during the period of limitations was a separate act of discrimination. *Id.* Alternatively, she argued that the 1998 decision denying her a raise "was 'unlawful because it carried forward intentionally discriminatory disparities from prior years.'" *Id.* "In essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period." *Id.* The Supreme Court rejected Ledbetter's first argu-

ment because she failed to allege actual discriminatory intent by the relevant Goodyear decision-makers when they issued her checks or denied her a raise in 1998. *Id.* Furthermore, the Court rejected Ledbetter's alternative argument, concluding that it was squarely foreclosed by the *Evans* line of authority. *Id.* The Court emphasized that the instruction from that line of authority is clear: "The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 2169. The Court specifically rejected as unsound Ledbetter's attempt to shift the intent from the prior discriminatory employment practice to the 1998 pay decision denying her raise. *Id.* at 2170. Accordingly, the Supreme Court held that Ledbetter's claim was untimely. *Id.* at 2172.

C

Bazemore stands for the general proposition that an employment practice coupled with discriminatory intent within the charging period gives rise to a current violation of Title VII, even if related to past, uncharged discriminatory acts. *See Ledbetter*, 127 S.Ct. at 2174. The *Evans-Ricks-Ledbetter* line of authority stands for the proposition that an act within the charging period that gives present *effect* to past discriminatory acts, without more, does not give rise to a current violation. Hulteen's case turns on whether AT & T calculated her benefits in 1994 with the requisite discriminatory intent (*Bazemore*) or whether that calculation simply gave effect through the NCS date of past, uncharged discriminatory acts (*Evans-Ricks-Ledbetter*).

In *Ameritech*, the Seventh Circuit found the *Evans* line of authority controlling because of the "fact, simplistic as it may seem, that [the] case involves computation of time in service—seniority by another name—followed by a neutral application of a benefit package to all employees with the same amount of time." *Ameritech*, 220 F.3d at 823. *Pallas* and the majority today, on the other hand, reached the contrary conclusion, finding that *Bazemore* was the "controlling Supreme Court precedent" for two reasons: "First, the discriminatory program which gave rise to this suit, the Early Retirement Opportunity, was instituted in 1987. . . . Pallas challenges the criteria adopted in 1987 to determine eligibility for the new benefit program. . . . Second, the net credit system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women." 940 F.2d at 1327. With respect, *Pallas* was clearly wrong. The Supreme Court's logic in *Evans, Ricks*, and *Ledbetter* dictates the outcome of the case before us today.

1

The Supreme Court's most recent decision in *Ledbetter* confirms that under *Evans* "current effects alone cannot breathe life into prior, uncharged discrimination." *Ledbetter*, 127 S.Ct. at 2169. The charging period (here, the 180 days during which Hulteen was required to file a charge with the EEOC), "is triggered when a discrete unlawful practice takes place." *Id.* Such a discrete unlawful practice requires the coalescence of two elements: (1) an employment practice (defined as "a discrete act or single 'occurrence' that takes place at a particular point in time"); and (2) discriminatory intent. *Id.* at 2169, 2171. Here, the majority concludes that the AT & T's denial of

benefits under the retirement plan in 1994 is an "employment practice." *Ante*, at 10041-42. But that alone is insufficient. *Ledbetter* requires concurrent discriminatory intent.

a

Pallas concluded that the "NCS [seniority] system used to calculate eligibility under the [retirement plans] is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women." 940 F.2d at 1327. Today, the majority locates discriminatory intent at the point AT & T calculated Hulteen's benefits in 1994 by embracing *Pallas*'s erroneous determination that the NCS seniority system is facially discriminatory and concluding that "[f]acial discrimination is 'by its very terms' intentional discrimination." *Ante*, at 10047 (citation omitted). The majority's position is erroneous.

AT & T's current NCS seniority system includes a facially nondiscriminatory and neutrally applied pregnancy leave rule that grants female employees who become pregnant after the enactment of the PDA full NCS seniority credit on the same terms as employees who become temporarily disabled. The retirement benefit plan under which Hulteen received retirement benefits is also facially nondiscriminatory and neutrally applied: calculation of eligibility and benefits under that plan are determined based on an NCS date maintained for each employee. That NCS date is also facially nondiscriminatory. But the majority asserts facial discrimination by looking long ago to the pre-PDA pregnancy leave rules that AT & T lawfully applied before the enactment of the PDA to adjust the NCS dates to grant only partial

seniority credit for pre-PDA pregnancy leave. The majority's conclusion reaches too far.

The problem with the majority's conclusion that the NCS seniority system is facially discriminatory because the NCS date reflects AT & T's pre-PDA pregnancy leave rules is that it necessarily depends on a retroactive application of the PDA. Before the enactment of the PDA, the Supreme Court had concluded in *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343, that classifications based on pregnancy involved *no facial gender-based discrimination. Id.* at 134-36, 138, 97 S.Ct. 401; *see also Nashville Gas Co. v. Satty*, 434 U.S. 136, 140, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977) ("Petitioner's decision not to treat pregnancy as a disease or disability for purpose of seniority retention is not on its face a discriminatory policy."). *Pallas* concluded that the NCS seniority system was facially discriminatory because it "distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities." 940 F.2d at 1327. This conclusion therefore rests on a silent premise that gives impermissible retroactive effect to the PDA.

A system is facially discriminatory, of course, if it treats similarly situated employees differently. Hulteen asserts that, as a female employee who took pregnancy leave prior to the enactment of the PDA, she was treated differently from employees who took leave for other temporary disabilities during that same period. But these two groups are not similarly situated. Temporarily disabled employees were not female employees who took pregnancy leaves, but were female and male employees who took other types of disability leaves and, under the lawful

seniority rules then in effect, were entitled to accrue seniority credit for the full duration of their leaves. And female employees who took pre-PDA pregnancy leaves under AT & T's then lawful pre-PDA pregnancy leave rules accrued seniority credit only for a portion of their leaves. While this may be regrettable in hindsight, because it was then lawful to distinguish between the two reasons for leaves prior to the PDA, the two groups were not similarly situated. AT & T's failure to award full seniority credit for pre-PDA pregnancy leaves could be labeled facially discriminatory only if employees in both groups were similarly situated. That would be true, however, only if the PDA were given impermissible retroactive effect. Because the PDA is *not* retroactive,[9] *Pallas* is wrong and the majority today is mistaken in

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[9] *Landgraf v. USI Films Prods.*, 511 U.S. 244, 258 n. 10, 114 S.Ct. 1483, 128 L.Fd 2d 229 (1994) ("[I]n amending Title VII to bar discrimination on the basis of pregnancy in 1978, Congress provided: 'Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.' The only Courts of Appeals to consider whether the 1978 amendments applied to pending cases concluded that they did not. If we assume that Congress was familiar with those decisions, its choice of language in § 402(a) would imply nonretroactivity." (citations omitted)); *Ameritech*, 220 F.3d at 823 (recognizing that the PDA has not been treated as retroactive); *Whitehead v. Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir.1999) (concluding that the PDA is not retroactive); *Wambheim v. J.C. Penny Co.*, 642 F.2d 362, 363 n. 1 (9th Cir.1981) (concluding that the PDA did not apply in a case where the facts occurred before 1978); *Fields v. Bolger*, 723 F.2d 1216, 1219 n. 4 (6th Cir.1984) (noting that the PDA "was intended to be prospective only in application"); *Schwabenbauer v. Board of Ed. of School Dist. of Olean*, 667 F.2d 305, 310 n. 7 (2d Cir.1981) (concluding the PDA is not retroactive); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir.1980) (same).

concluding that AT & T's pre-PDA pregnancy leave rules were facially discriminatory in violation of Title VII. Accordingly, because the majority errs in concluding that the NCS seniority system is facially discriminatory in violation of Title VII, it necessarily errs in finding current discriminatory intent based on the 1994 calculation.

b

Straining to find discriminatory intent when AT & T calculated Hulteen's retirement benefits in 1994 based on the NCS date, the majority also asserts that Hulteen satisfies that burden by pointing to a single act by AT & T in crediting *another* employee's NCS date based on the pre-PDA pregnancy leave rules. *Ante*, at 10046. In 2000, AT & T credited Snyder's NCS seniority date for 30 days because previously her NCS date mistakenly had not been credited at all for her pregnancy leave in 1974. The majority extrapolates from this retroactive credit that "in the determination of benefits, AT & T does not simply rely on pre-PDA NCS calculations," but "reviews an employee's entire work history and affirmatively chooses to apply 'the policy at the time' that the leave occurred." *Ante*, at 10046. Any contrary assertion, the majority contends, "is belied by this record." *Ante*, at 10046. But it is the majority's perception of discriminatory intent based on this isolated response to an error that is belied by the applicable standard of review.

While previously recognizing that "'[w]e must determine, viewing the evidence in the light most favorable to [AT & T], the non-moving party, whether [there are any genuine issues of material fact and whether] the district court correctly applied the substantive law,'" *ante*, at 10033 (second alteration in

original) (quoting *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir.2004)), the majority fails to apply that standard here. Viewing the evidence in the light most favorable to AT & T, as we must, the letters evidencing AT & T's crediting of Snyder's NCS date fail to demonstrate that, "when AT & T determines benefits eligibility, it reviews an employee's entire work history and affirmatively chooses to apply 'the policy at the time' that the leave occurred." *Ante*, at 10046. Rather, in the light most favorable to AT & T, that evidence suggests that AT & T relies on the pre-PDA NCS calculations, but in this one case an error came to light that required it to review Snyder's entire work history and to adjust her NCS date for a previously uncredited pre-PDA pregnancy leave. That evidence further suggests that AT & T reviewed Snyder's service record and adjusted her NCS date in response to her request, not as a matter of course for all employees: "In preparing *your claim for service credit* for the period of your maternity leave of absence for review by the Employees' Benefit Committee, it was determined that you were not given service credit for the first 30 calendar days of your leave (as was the policy at the time)." Moreover, the parties stipulated that "whether or not Snyder's NCS date was adjusted in the year 2000 does not affect the outcome of this [stage of the] proceeding."

The only thing that is "'too obvious to warrant extended discussion,'" *ante*, at 10046 (quoting *Ledbetter*, 127 S.Ct. at 2173), is the majority's far-reaching efforts to infer the requisite discriminatory intent at the time AT & T calculated and/or denied retirement benefits. Simply put, the record fails to demonstrate that AT & T acted with discriminatory intent during the charging period.

There is no meaningful basis for distinguishing *Evans* and this case, which becomes abundantly evident when the key aspects of each case are compared. In both *Evans* and here, the employers maintained a host of employment programs[10] that determined eligibility based on a seniority system. Those benefit programs were facially nondiscriminatory and neutrally applied, but gave effect through the seniority system to past discriminatory acts. Evans's seniority was less because in early 1968 United maintained a policy that forced her to resign because she was female and because she married. Hulteen's seniority was less because AT & T maintained a pre-PDA pregnancy leave rule that forced her to take personal leave with only partial NCS seniority credit because she was female and because she became pregnant. Because of the past acts of discrimination, Evans and Hulteen had less seniority,[11] and, not surprisingly, the determinations of their benefits under those programs were adversely affected.

Faced with "the question . . . whether the employer is committing a *second* violation of Title VII by refusing to credit her with seniority for any [prior] period," the Supreme Court concluded in *Evans* that

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[10] In *Evans*, the seniority system "determine[d] a flight attendant's wages; the duration and timing of vacations; rights to retention in the event of layoffs and rights to re-employment thereafter; and rights to preferential selection of flight assignments." 431 U.S. at 555 n. 5, 97 S.Ct. 1885. In *Pallas*, as in this case, the NCS system was used for a host of employment-related purposes, including job bidding, shift preferences, layoffs, and eligibility for and calculation of certain benefit programs.

[11] Seniority, by its very nature, reflects past employment decisions.

"such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." 431 U.S. at 554, 560, 97 S.Ct. 1885. Thinking itself the wiser, the majority adopts *Pallas*'s "contrary view," which, with respect, should be rejected because it "substitute[s] a claim for seniority credit for almost every claim which is barred by limitations." *Id.* at 560, 97 S.Ct. 1885.

3

The majority repeats *Pallas's* error by invoking *Bazemore* in this case. *See ante*, at 10035-37. *Bazemore* is simply inapposite. First, as the Supreme Court recently emphasized in *Ledbetter*, "*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues a paycheck using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory and neutrally applied.'" *Ledbetter*, 127 S.Ct. at 2174 (quoting *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 911, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989)). As discussed above, Hulteen's retirement benefits were calculated pursuant to a facially nondiscriminatory and neutrally applied benefits plan, which relies upon the NCS date. That date, which is the product of the NCS seniority system, gives effect to the then lawful pre-PDA pregnancy leave rules that granted only partial NCS credit for pre-PDA pregnancy leave. However, without having established discriminatory intent in 1994 when AT &

T calculated benefits, *Bazemore* is of no help to Hulteen. As the Supreme Court emphasized in *Ledbetter*, "[t]he fact that precharging period discrimination adversely affects the calculation of a neutral factor (like *seniority*) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period." 127 S.Ct. at 2174 (emphasis added).

Second, in *Bazemore* the post-Title VII salary structure resulted in a fresh violation of Title VII because it was a "'*mere continuation*'" of the pre-Title VII discriminatory pay structure. *Ledbetter,* 127 S.Ct. at 2173 (quoting *Bazemore*, 478 U.S. at 397 n. 6, 106 S.Ct. 3000 (Brennan, J., joined by all other Members of the Court, concurring in part)). But in this case, AT & T's NCS seniority system is not the "mere continuation" of the pre-PDA pregnancy leave rules; indeed it was expressly amended to give full effect to pregnancy leave post-PDA. In *Bazemore*, a current violation existed because the Service paid black employees less than white employees for each new hour (week, month, or year) of work *after* the enactment of Title VII. In this case, no current violation exists: AT & T grants NCS seniority credit for each period of pregnancy leave after the enactment of the PDA, on the same terms as disability-related leave. Simply put, unlike in *Bazemore*, AT & T's pre-PDA pregnancy leave rules no longer apply to female employees who took pregnancy leave after the enactment of the PDA, which made such distinction based on pregnancy a violation of Title VII. *Bazemore* would only be analogous in this case if AT & T had continued to deny full NCS seniority credit to female employees who had taken pregnancy leave after the enactment of the PDA and attempted to defend that practice on the ground that it began before

the enactment of that Act.[12] But AT & T did no such thing.

Finally, the majority's strained interpretation of *Bazemore* effectively imposes an unjustified burden on AT & T to remedy all acts of discrimination on the basis of pregnancy *before* the enactment of the PDA. Because the PDA is not retroactive,[13] that is more than Congress required with the PDA. That is also more than the Supreme Court required in *Bazemore*. There, the Court held that "recovery may *not* be permitted for pre-[Title VII] acts of discrimination"; thus the Service was not required to pay retroactively the salary disparity for pre-Title VII discrimination. *Bazemore*, 478 U.S. at 395, 106 S.Ct. 3000 (Brennan, J., joined by all other Members of the Court, concurring in part) (emphasis added). Indeed, the Supreme Court emphasized that its decision in *Bazemore* "in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* . . . , focuses on the present salary structure, which is illegal if it is a mere continuation of the [pre-Title VII] discriminatory pay structure." *Id.* at 396 n. 6, 106 S.Ct. 3000. By requiring AT & T now to grant retroactive NCS seniority credit for pregnancy leave prior to the effective date of the PDA, the majority impose an

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[12] For example, if a female employee took pregnancy leave in 1976, before the enactment of the PDA, and again in 1981, after the enactment of the PDA, the reasoning in *Bazemore* would apply only if AT & T continued to limit NCS seniority credit to 30 days (the maximum credit under AT & T's pregnancy leave rule in effect in 1976) for her pregnancy leave in 1981. However, AT & T grants full NCS seniority credit for pregnancy leaves taken after the enactment of the PDA. Accordingly, *Bazemore* is simply inapt here.

[13] *See* cases cited *supra* n. 9.

entirely gratuitous burden upon AT & T to remedy the NCS seniority system with respect to all classifications based on pregnancy occurring before the enactment of the PDA. *Bazemore* provides no support for such arbitrary result.

D

In sum, because there is no evidence that AT & T acted with the requisite discriminatory intent in 1994 when it calculated Hulteen's retirement benefits based in part on the NCS seniority system, *Bazemore* is inapposite. Without more, the NCS seniority system simply gives present effect to a past pre-PDA incident. Under *Evans* that pre-PDA incident is "merely an unfortunate event in history [with] no present legal consequences." 431 U.S. at 558, 97 S.Ct. 1885. For this reason, the Supreme Court's logic in the *Evans* line of authority, reinforced weeks ago in *Ledbetter*, controls the outcome of this case. Under that line, "[a] new violation does *not* occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Ledbetter*, 127 S.Ct. at 2169 (emphasis added). The time for Hulteen to have challenged AT & T's pre-PDA pregnancy leave rules has long since expired.

IV

A

As the Seventh Circuit recognized in *Ameritech*, 42 U.S.C. § 2000e-2(h) "offers good reason to treat seniority systems with special care, because it specifically exempts discriminatory effects that flow from *bona fide* seniority systems from the definition of unlawful employment practices, as long as the differences are not the result of an intention to discrim-

inate." *Ameritech*, 220 F.3d at 823; *see also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) ("Seniority systems . . . are afforded special treatment under Title VII."). That section states:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. § 2000e-2(h).

Section 2000e-2(h) provides AT & T no protection in this case if (1) AT & T's NCS seniority system is not a "bona fide" seniority system; or (2) the differences are a result of an intention to discriminate.

Neither exception bars protection of AT & T's NCS seniority system here.

First, the Supreme Court held in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), that an otherwise valid seniority system did not lose its bona fide character simply because its operation may perpetuate past discrimination. *Id.* at 353-54, 97 S.Ct. 1843. In *Teamsters*, the Supreme Court considered a seniority system that allegedly perpetuated the effects of pre-Title VII discrimination. *Id.* at 348, 97 S.Ct. 1843. The employer's seniority system unmistakably advantaged white employees who had accumulated longer tenure because of the "employer's prior intentional discrimination" against "Negro and Spanish-surnamed employees" before the enactment of Title VII. *Id.* at 349-50, 97 S.Ct. 1843. The Court stated that it "must decide, in short, whether [§ 2000e-2(h)] validates otherwise bona fide seniority systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII." *Id.* at 349, 97 S.Ct. 1843. And the Court concluded that, "[a]lthough a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment [through § 2000e-2(h)] was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." 431 U.S. at 352-53, 97 S.Ct. 1843. Thus, AT & T's NCS seniority system does not lose its bona fide characteristic simply because it gives effect to the pre-PDA pregnancy leave rules that granted only partial NCS credit for pre-PDA pregnancy leave.

Second, under § 2000e-2(h), "[t]o be cognizable, a claim that a seniority system has a discriminatory impact must be accompanied by proof of a discriminatory purpose." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 69, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). But, as the Seventh Circuit held in *Ameritech*, "these employees cannot show the kind of intentional discrimination that would trigger the exception to the statutory protection afforded to seniority systems" because "prior to the adoption of the PDA an authoritative Supreme Court decision had held that Title VII did not prohibit distinctions based on pregnancy." 220 F.3d at 823 (citing *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343). Moreover, because the PDA is not retroactive, *see supra* n. 9, AT & T "would have no reason to think it had to reshuffle its NCS list after the Act was passed," *Ameritech*, 220 F.3d at 823, and therefore the continued reliance on the unadjusted NCS date cannot constitute intentional discrimination.

B

In an effort to frustrate reliance on § 2000e-2(h), the majority simply reads that provision out of the statute in all pregnancy discrimination cases. *Ante*, at 10048-51. The majority points to the PDA, which states that "women affected by pregnancy, . . . shall be treated the same for all employment related purposes, . . . as other persons not so affected but similar in their ability or inability to work, *and nothing in section § 2000e-2(h) of this title shall be interpreted to permit otherwise*" (the "§ 2000e-(2)(h) proviso"). 42 U.S.C. § 2000e(k) (emphasis added). While the majority's argument has surface appeal, that proviso cannot bear the burden it attempts to place upon it.

First, the majority's interpretation of that section completely removes the application of § 2000e-2(h) in all pregnancy discrimination suits under Title VII. *Ante*, at 10048-51. But Congress did not go so far. If Congress had intended wholly to prohibit the application of § 2000e-2(h) in all pregnancy discrimination cases, Congress would have expressed this intent more clearly, as it did with other provisions in the Civil Rights Act. *Compare, e.g.*, 42 U.S.C. § 2000a(e) ("The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."); *id.* § 2000e-1(c)(2) ("Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.").

Second, the conclusion that Congress did not intend that proviso to remove § 2000e-2(h)'s protection for bona fide seniority systems in all pregnancy discrimination cases draws further support from the context in which Congress passed the PDA. "Congress enacted the Pregnancy Discrimination Act of 1978, amending Title VII to include pregnancy classifications within the statutory definition of sex discrimination," in response to the Supreme Court's decision in *Gilbert*. *See Toomey v. Clark*, 876 F.2d 1433, 1437 (9th Cir.1989). By amending Title VII to define "because of sex" to include on the basis of pregnancy, the PDA "in effect overruled" *Gilbert's* general holding that an employer's disability benefit plan did not violate Title VII because it excluded pregnancy-related disabilities. *Toomey*, 876 F.2d at 1437. By adding the § 2000e-2(h) proviso to the PDA,

Congress did not intend to remove that section's protection of bona fide seniority systems in all pregnancy discrimination actions as the majority argues, but rather to address a specific anomaly suggested in *Gilbert*.

In *Gilbert*, the Supreme Court refused to defer to the EEOC's interpretation of Title VII to prohibit discrimination on the basis of pregnancy, because it appeared to conflict with another agency's interpretation of the Equal Pay Act. 429 U.S. at 144-45, 97 S.Ct. 401. The last sentence of § 2000e-2(h), the so-called Bennett Amendment, was the source of the apparent conflict in *Gilbert*. The Bennett Amendment provides that "[i]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pact Act, 29 U.S.C. § 206(d)]." 42 U.S.C. § 2000e-2(h). The Equal Pay Act, in turn, generally authorizes the payment of wages to employees at a lesser rate than the opposite sex "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a deferential based on any other factor other than sex" 29 U.S.C. § 206(d)(1), *quoted in Gilbert*, 429 U.S. at 144 n. 21, 97 S.Ct. 401.[11] In *Gilbert* the Supreme Court interpreted the Bennett Amendment, in conjunction

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[11] In *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), the Supreme Court held that the Bennett Amendment incorporated into Title VII the four affirmative defenses of the Equal Pay Act in sex-based wage discrimination cases. *Id.* at 171, 101 S.Ct. 2242.

with an agency regulation under the Equal Pay Act, to permit under Title VII the exclusion of benefits under Title VII for pregnancy-related disabilities under an employer's disability plan. *Id.* 144-45, 97 S.Ct. 401. Considering itself "pointed in diametrically opposite directions by the conflicting regulations," the Supreme Court declined to grant deference to the EEOC's interpretation of Title VII to prohibit discrimination on the basis of pregnancy. *Id.* 145-46, 97 S.Ct. 401. For these reasons, Congress added the § 2000e-2(h) proviso to foreclose the possibility raised in *Gilbert* that the Bennett Amendment would permit wage discrimination under Title VII on the basis of pregnancy.

In sum, contrary to the majority's conclusion, the plain meaning of the § 2000e-2(h) proviso in the PDA and the accompanying context establish that Congress did not intend to remove the protections of § 2000e-2(h) for bona fide seniority systems in all pregnancy discrimination actions. Congress, of course, was free to excise § 2000e-2(h) with respect to pregnancy discrimination actions. But the majority reads far too much into the § 2000e-2(h) proviso in the PDA, and therefore it is the majority, and not Congress, that renders that section wholly inapplicable in such actions.

V

The majority also relies on 42 U.S.C. § 2000e-5(e)(2) to shore up its conclusion that Hulteen's sex discrimination claim is timely. Congress added § 2000e-5(e)(2) to Title VII with the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, 1078-79

(Nov. 21, 1991).[15] That section states in relevant part that

> an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2). As the Seventh Circuit succinctly put it in *Ameritech*, under § 2000e-5(e)(2) "[i]f the employees are able to show intentional discrimination, their action accrues at the time they are *injured* by the seniority system—that is, when they

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[15] The majority contends that the Civil Rights Act of 1991 simply "*clarified* that injury occurs at the time that the seniority system is applied to the aggrieved party because that is when the employee is actually harmed by the deprivation of benefits." *Ante*, at 10045 (emphasis added). But the Supreme Court recently rejected that view. *See Ledbetter*, 127 S.Ct. at 2169 n. 2 ("The dissent attaches great significance to [the Civil Rights Act of 1991], suggesting that it shows that *Lorance* was wrongly reasoned as an initial matter. However, the very legislative history cited by the dissent explains that this amendment and the other 1991 Title VII amendments "'*expand[ed]* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.'" (emphasis and second alteration in original) (citations omitted)).

are denied benefits."[16] *Ameritech*, 220 F.3d at 823 (emphasis added).

If that section were to apply here, Hulteen's sex discrimination action, of course, would have been timely. For § 2000e-5(e)(2) to apply, however, Hulteen would have to establish that AT & T *adopted* its NCS seniority system "for an intentionally discriminatory purpose in violation of" Title VII. The majority boldly asserts that AT & T's seniority system intentionally discriminates against pregnant women because the NCS system "'facially discriminates against pregnant women [because it] distinguishes between similarly situated employees'" and "[f]acial discrimination is 'by its very terms' intentional discrimination." *Ante*, at 10047 (quoting *Pallas*, 940 F.2d at 1327, and *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002)). But the majority simply ignores the statutory requirement that Hulteen must show such intentional discrimination at the time the seniority system was *adopted*.

Contrary to the majority's assertion, § 2000-5(e)(2) cannot serve to revive Hulteen's sex discrimination charge in this case. Hulteen cannot show that AT & T *adopted* the pre-PDA pregnancy leave rules at the heart of this case with an intentionally discriminatory purpose. *See also Ameritech*, 220 F.3d at 823 (holding that the "employees cannot show the kind of

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[16] The majority asserts that "[t]he Seventh Circuit's analysis in *Ameritech* is problematic because, although it mentioned the Civil Rights Act of 1991, it failed to actually apply it." *Ante*, at 10047. Far from ignoring that Act as the majority suggests, the Seventh Circuit concluded that it did not apply because the employees failed to show discriminatory intent at the time the employer adopted the seniority system, a statutory prerequisite. *Ameritech*, 220 F.3d at 823.

intentional discrimination that would trigger the exception to the statutory protection afforded to seniority systems"). First, the Supreme Court held in *Gilbert* that Title VII did not necessarily prohibit distinctions based on pregnancy before the enactment of the PDA. 429 U.S. at 145-56, 97 S.Ct. 401. There, the Supreme Court concluded that an employer's disability benefits plan did not violate Title VII because it failed to cover pregnancy-related disabilities. *Id.*[17] Second, the Supreme Court expressly held in *Gilbert* that classifications based on pregnancy were not facially discriminatory. *Id.* at 134-36, 138, 97 S.Ct. 401; *see also Satty*, 434 U.S. at 140, 98 S.Ct. 347 ("Petitioner's decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy."); *supra* pp. 10065-67. AT & T adopted the pregnancy leave rules at the core of this case before the PDA and changed those rules prospectively upon the enactment of the PDA in full compliance with the statute that changed the operative playing field previously defined by the Supreme Court. Accordingly, in light of these authoritative Supreme Court

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[17] While erecting a confusing benefits-burdens framework, in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356, the Supreme Court reaffirmed *Gilbert*. There, the Court concluded that Title VII allowed an employer to deny benefits to female employees who became pregnant, but Title VII prohibited an employer from imposing on female employees who became pregnant a burden that men need not suffer. *Id.* at 142, 97 S.Ct. 401. Under that approach, the Supreme Court in *Satty* concluded that an employer's policy of requiring forfeiture of all *accumulated* seniority for female employees who became pregnant violated Title VII, *id.* at 138-43, 98 S.Ct. 347, but, reaffirming *Gilbert*, held that an employer's policy of not awarding sick-leave pay to female employees who became pregnant did not violate Title VII, *id.* 143-46, 97 S.Ct. 401.

precedents, Hulteen cannot establish that AT & T *adopted* those pre-PDA pregnancy leave rules for an intentionally discriminatory purpose in violation of Title VII. *See Ameritech*, 220 F.3d at 823. Absent a showing of discriminatory intent at that time, § 2000e-5(e)(2) does not apply in this case.

VI

As Judge Dumbauld lamented in his dissent to *Pallas*, we consider "'a melancholy tale [o]f things done long ago, and ill-done.'" 940 F.2d at 1327 (Dumbauld, J., dissenting) (quoting John Ford, The Lover's Melancholy). Because *Pallas* invented a timely Title VII violation where the determination of benefits simply gave present effect to past, unchallenged acts, contrary to Supreme Court authority, it must be overruled. Because the majority today erroneously embraces *Pallas* and perpetuates a circuit split with the Sixth and Seventh Circuits, I must respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 04-16087

NOREEN HULTEEN; ELEANORA COLLET, LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,
Plaintiffs-Appellees,

v.

AT & T CORPORATION,
Defendant-Appellant.

Argued and Submitted Oct. 20, 2005.
Filed March 8, 2006.

Appeal from the United States District Court
for the Northern District of California;
Martin J. Jenkins, District Judge, Presiding.
D.C. No. CV-01-01122-MJJ.

Before: TROTT, RYMER, and PLAGER,* *Circuit Judges*.

PLAGER, *Circuit Judge*:

This is a Title VII Civil Rights case.[1] It requires us to decide whether AT & T, in making current retirement benefits determinations, discriminates in

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* The Honorable S. Jay Plager, Senior Circuit Judge for the Federal Circuit, sitting by designation.

[1] 42 U.S.C. § 2000e et seq.

violation of Title VII against women who took pregnancy-related leaves before 1979. 1979 was the year when the Pregnancy Discrimination Act of 1978 (PDA), an amendment to Title VII, became effective.[2]

Prior to the PDA, an AT & T employee on pregnancy leave was not awarded service credit for the entire period of her absence, whereas employees on other temporary disability leaves received full service credit for that time period. Although AT & T today awards full credit for pregnancy leaves, plaintiffs in this case, four female employees and the Communications Workers of America (CWA), complain that the company's failure to give employees full service credit for their pre-PDA leaves affects their eligibility for and computation of retirement benefits and is therefore a present violation of the PDA. AT & T marshaled a number of arguments based on the current state of the law.

The district court, while acknowledging the "great logical and legal f rce" of AT & T's arguments, felt

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[2] Title VII makes it an unlawful employment practice for an employer to discriminate against any individual because of such individual's sex. 42 U.S.C. § 2000e-2(a). Congress amended Title VII in 1978 to provide:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, child-birth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k).

compelled by this court's decision in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir.1991), to conclude that AT & T's post-PDA benefits determinations violated the PDA. The district court therefore granted summary judgment in plaintiffs' favor on their Title VII claims. Because the result reached by the district court gives the PDA impermissible retroactive effect under controlling law today, we reverse the judgment of the district court.

BACKGROUND

Noreen Hulteen, Eleanora Collet, Linda Porter, and Elizabeth Snyder were long-time employees of Pacific Telephone and Telegraph (PT & T), a Bell System operating company that was transferred to AT & T when the former Bell system was broken up in 1984. They continued to work for AT & T thereafter. PT & T and, in turn, AT & T maintain a "Net Credited Service" (NCS) date for all employees. The NCS date consists of an employee's original hire date and adjustments for periods during which no service credit is accrued. Periods of leave or other breaks in service that are not credited result in a later NCS date than the employee's original hire date. The NCS date is used to determine benefits for which employees may qualify, including the amount of pension payments, eligibility for early retirement, qualification for voluntary termination packages, job bidding, shift preferences, and seniority for layoffs.

Hulteen, Collet, Porter and Snyder took pregnancy leaves between 1968 and 1976. Before August 7, 1977, PT & T treated pregnancy leaves as personal leaves for which the employee was given a maximum of 30 days of service credit; at the same time, employees on disability leave for reasons other than pregnancy received full service credit for the entire

period of their absence. Also, female employees who took a personal leave because of pregnancy and became temporarily disabled while on that leave for reasons unrelated to pregnancy were ineligible for sickness or disability benefits or for NCS credit in excess of 30 days. On August 7, 1977, PT & T adopted the Maternity Payment Plan (MPP) under which pregnant employees could begin a pregnancy leave at any mutually convenient time and were eligible for disability benefits for up to six weeks of leave. They received service credit for this period, but beyond this, absence became a personal leave. Employees whose pregnancy-related disability lasted longer than six weeks and who then had a second disability received no service credit for the period of the second disability. Employees on non-pregnancy-related disability leave received full service credit for the entire period of their disability absence, including for leave resulting from disability for a different reason from the initial disability.

On April 29, 1979, the effective date of the PDA, PT & T adopted the Anticipated Disability Plan (ADP), which superseded the MPP and provided service credit for pregnancy leaves on the same basis as leaves taken for other temporary disabilities. No adjustment was made to the service credit calculations of employees who had been subject to pre-MPP policies when the MPP was adopted, or for pre-ADP calculations when the ADP was adopted.

In 1982 the United States District Court for the District of Columbia entered a consent decree and Modified Final Judgment to resolve the government's antitrust suit against AT & T. *United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001,

103 S.Ct. 1240, 75 L.Ed.2d 472 (1983). Among other things, the judgment required recognition of pre-divestiture employment service by the newly-created regional telephone holding companies and their subsidiaries, including PT & T. It resulted in a Plan of Reorganization that was approved by the court in 1983. *United States v. Western Elec. Co.*, 569 F.Supp. 1057 (D.D.C.1983), *aff'd sub nom., California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983). The Plan of Reorganization specifies that "all employees will carry with them all pre-divestiture Bell System service regardless of the organizational unit or corporation by which they are employed immediately after divestiture." It also states that "[a]ll employees and retirees of any pre-divestiture Bell System entity will have the same pension benefit entitlements immediately after divestiture as they had immediately prior to divestiture under the existing [Bell System pension plans]."

Over the years, collective bargaining agreements between AT & T and the CWA have contained provisions recognizing the use of NCS as established by company practice to determine various employment-related benefits. AT & T has continued to utilize employees' NCS dates as the basis for computing benefits and determining other rights negotiated in collective bargaining agreements.

Hulteen's employment was terminated June 1, 1994 through a reduction in force; Collet retired early under a Voluntary Retirement Incentive Program on December 31, 1998; Porter is a current employee who has not yet retired; and Snyder voluntarily terminated her employment on April 28, 2000 pursuant to a Voluntary Termination Plan. Calculation of their benefits or the date of their retirement opportunities

would have been more favorable had AT & T or PT & T credited some or all of the previously uncredited time they were off work due to pregnancy leaves prior to 1979.

Each filed a charge with the Equal Employment Opportunity Commission (EEOC). The first of these charges was filed in 1994. The EEOC issued a Letter of Determination finding reasonable cause to believe that AT & T discriminated by determining eligibility for benefits and retirement offerings based on the applicable NCS date. The CWA likewise filed a charge of discrimination on behalf of its bargaining unit employees. The EEOC issued a notice of right to sue to all claimants. Hulteen, Collet, Porter, and Snyder then filed suit in 2001 on their own behalf and on behalf of a class of similarly situated employees. The CWA joined.

The parties filed cross-motions for summary judgment on plaintiffs' Title VII claims. Although the district court found AT & T's arguments "compelling," it considered itself bound by *Pallas* and obligated to follow it. Accordingly, plaintiffs' motion was granted. The district court certified the order for interlocutory appeal, and we granted AT & T's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

DISCUSSION

The arguments and the briefs in this case were focused on whether the outcome is dictated by this court's 1991 *Pallas* decision. The issue before us, however, is not *Pallas*, but *Hulteen*—whether the trial court erred in this case in holding for the Hulteen plaintiffs. To sustain their Title VII cause of action, plaintiffs on appeal must do two things: one,

find some way to have the pre-PDA leaves credited under post-PDA rules; and two, since the alleged unlawful practice occurred prior to 1979, find a hook on which to base their lawsuit that is recent enough to avoid the statute of limitations requiring that charges be filed with the EEOC within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). The first is the retroactivity problem; the second the statute of limitations problem.

The ultimate question to be answered in this appeal is, in light of controlling law, what is the correct result? Controlling law in this case, as in all cases governed by federal law, is what Congress has enacted and what the Supreme Court has said regarding the key matters on which the case turns. The congressional enactment at issue is Title VII, as amended from time to time. There are several recent Supreme Court decisions of direct relevance. Once we understand the terms of controlling law, we can then determine whether there is circuit precedent that is inconsistent. If so, we will have no choice but to ignore such precedent, or, to put it more delicately, conclude that such precedent is not binding.[1]

I. Retroactivity

"The presumption against statutory retroactivity is founded upon sound considerations of general policy

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[1] It is hornbook law that decisions of circuit courts of appeals yield to conflicting decisions of the Supreme Court. Both the Ninth Circuit and the Federal Circuit, as well as other circuits, recognize that a panel is bound to follow the latter, not the former. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir.2003) (en banc); *Tex. Am. Oil Corp. v. United States Dep't of Energy*, 44 F.3d 1557, 1561 (Fed.Cir.1995) (en banc); *Finkel v. Stratton Corp.*, 962 F.2d 169, 174-75 (2d Cir.1992).

and practice, and accords with long held and widely shared expectations about the usual operation of legislation." With those words the Supreme Court in 1994 concluded a thorough review and restatement of the law governing the retroactivity of congressional enactments. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 293, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Restatement may be the wrong word—'sea change' may be more accurate. Before *Landgraf*, notions such as "manifest injustice" and similar equitable phrases were all the guidance the lower courts had, not to mention lines of cases pointing in opposite directions creating what the Court referred to as an "apparent tension" between the expressions used in the cases. *Id.* at 264, 114 S.Ct. 1483; *compare Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), *with Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988). After *Landgraf* the rules are unambiguous: in the absence of a clear expression of intent by Congress that a particular legislative enactment is to apply to events that occurred before the effective date of the legislation, the default rule is *no retroactive application:* "prospectivity remains the appropriate default rule." *Id.* at 272, 114 S.Ct. 1483.[1]

As with all general rules, there are exceptions. When the issue is a court's jurisdiction, *id.* at 274, 114 S.Ct. 1483, or a change in procedural rules, *id.* at 275, 114 S.Ct. 1483, intervening statutes may when appropriate be applied to current cases. But when

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[1] Though described as a "default" rule, the Court noted in *Landgraf* that there may be due process or other constitutional limitations on Congress's ability to apply legislation retroactively.

dealing with the rights and property interests of the individual,

> the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Id. at 265-66, 114 S.Ct. 1483 (citation omitted).

In the case before us, we are dealing with contractual or property rights related to established pension and other retirement obligations of the employer and benefits of the employees, rights which the Court described as "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity . . . , matters in which predictability and stability are of prime importance." *Id.* at 271, 114 S.Ct. 1483. Before the PDA, the counting rules applied by AT & T (and its related companies—hereafter collectively AT & T) did not grant the same degree of service credit for pregnancy leaves that were awarded other temporary disabilities. As objectionable as that may seem now, those counting rules at the time were legal, and had been expressly so held under the then-existing Title VII. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976).

The PDA, effective in 1979, was intended to prohibit future use of that accounting distinction. Thereafter, and in accordance with the PDA, AT & T's service credit rules were amended to treat all subsequent pregnancy leaves in the same manner as

other disability leaves. Plaintiffs' union, the CWA, negotiated in 1979 what it viewed as PDA-compliant service credit rules. The CWA has prospectively incorporated these service credit rules into its national collective bargaining agreements with AT & T ever since.

In order for the plaintiffs to obtain service credit for their pre-1979 pregnancy disability leaves (in excess of that amount the system then granted), i.e., for their NCS dates to be readjusted back, one of two things must happen. The employer could voluntarily decide to grant the additional credits, or the law could compel the employer to do so on the grounds that refusal to do so is a violation of law. The first obviously has not happened. The second can be arrived at by either of two theories—(1) the denial of full disability credit for the pre-1979 maternity leaves, lawful at the time, has been made unlawful as a matter of law, and must be corrected; or (2) the denial today of the *benefits* the full credits would have earned constitutes a new, post-1979, wrong. We address each of these theories in turn.

A.

Has there been a change in the law such as to make unlawful the denial of full disability credits for pre-1979 pregnancy leaves (taken before enactment of the PDA)? The law cited by plaintiffs as controlling this case is the PDA. There is nothing in the text of the PDA to indicate a clear congressional intent that the provisions of the statute are to be applied in such a way as to change the legal consequences of conduct that occurred prior to the statute's enactment. The relevant conduct is the employer's practice, pre-PDA, of giving only limited service credit for pregnancy leaves, and the accept-

ance of that practice by the affected employees (and their union representatives). It is widely understood that there is nothing in the PDA that suggests a congressional intent to make the statute retroactive. *Wambheim v. J.C. Penney Co.*, 642 F.2d 362, 363 n. 1 (9th Cir.1981); *see also Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir.1999); *Schwabenbauer v. Bd. of Educ.*, 667 F.2d 305, 310 n. 7 (2d Cir.1981); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir.1980). Indeed, the most the plaintiffs could offer on this issue is that "Congress *did not* clearly intend the PDA to be prospective only." Appellees' Br. at 44 n. 9. That obviously falls far short of the *Landgraf* test for congressionally-mandated retroactivity.

As the Supreme Court explained in its *Landgraf* decision, a statute has retroactive effect when the new provision attaches new legal consequences to events completed before its enactment. Before that can happen, there must be clear congressional intent to make the statute retroactive, otherwise the default rule applies: the statute will not be given retroactive effect. Since there is an absence of clear congressional intent to the contrary, the default rule applies here and the result is that theory number 1—that the new law, the 1979 PDA, has made the pre-1979 pregnancy leave counting method unlawful—is legally without foundation and must be rejected.

B.

Plaintiffs recognize the problem with theory number 1, and thus rest their case on theory number 2: it is not the initial crediting of the leave period that is the offense, but the later—much later—award of retirement or other benefits: "[t]he only acts alleged as unlawful here are AT & T's decisions denying equal

benefits when each of the plaintiffs and similarly situated female employees retired or were terminated *in the mid-1990s and thereafter*—decisions made *long after* the PDA came into effect."Appellees' Br. at 49. In plaintiffs' view, since the benefits are keyed to the service credits, the calculation of benefits without full credit for the pregnancy leaves, regardless of when the leaves occurred, is a current act of discrimination in violation of Title VII.

Enforcing the requirement that pregnancy leaves be given full credit regardless of when they occurred, as plaintiffs insist, would provide an attractive result. It gives the plaintiffs the same benefits their post-PDA colleagues receive under essentially the same circumstances, and it carries forward the purpose of the change in law. In *Landgraf*, however, the Supreme Court noted the latter point, but rejected it as a basis for decision: "It will frequently be true, as petitioner and amici forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity." *Landgraf*, 511 U.S. at 285-86, 114 S.Ct. 1483.

With regard to giving the plaintiffs the same benefits their post-PDA colleagues have, that seemingly equitable resolution of the case also has problems—we must consider the consequences of such a ruling. To get that result requires that we do indirectly what we cannot do directly—make the PDA retroactive. That such a result is only reachable by a retroactive application of the PDA can be illustrated by restating plaintiffs' argument with specific reference to the facts of their case: is it unlawful to give retirement or other benefits today to some

women based on full maternity disability leave credit (leaves occurring post-PDA), while denying equal benefits to women who received for their maternity leaves only partial credit (pre-PDA leaves)? If the answer is yes, that it is unlawful to have disparate benefits awarded, it can only be because the pre-PDA leaves are entitled to full, rather than partial credit. And since the pre-PDA partial leave credit system was lawful at the time the credits were awarded, the change in their legal status must be because the later-enacted PDA has the effect of changing that status. That is retroactivity.

The key is differentiating cause from effect. If an action has the effect of causing a later consequence, and if the action, though permissible at the time, is subsequently made impermissible by a change in law, it cannot be the rule that such change will always make the consequences of the original action also impermissible. If that were the rule, every change in law would have retroactive consequences, and *Landgraf's* presumption against retroactivity would be meaningless.

However, because cause and effect may not always be so clear in specific fact situations, and because the equities of the case may argue for a result that corrects for past discrimination, application of the rule in different cases requires careful analysis. Assume a case in which black employees are paid lower wages than white employees for equal work. A statute is passed that, prospectively, prohibits such discrimination in employment. Thereafter, though the employer no longer distinguishes between black and white employees in terms of entrance salaries, across-the-board raises, and percentage raises, some pre-existing salary disparities between blacks and

whites remain and are reflected in the actual wages being received on an ongoing basis. The continuation of prior wage discrimination into current wages is not permissible: "While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed." *Bazemore v. Friday*, 478 U.S. 385, 395, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). It was the current wages reflecting racial differences that put the employer in violation of current law: "Our holding in no sense gives legal effect to the pre-1972 actions, but . . . focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure." *Id.* at 396, 106 S.Ct. 3000 n. 6.

Contrast that case with one in which an employee is terminated from her employment for a reason (that she married) that later is declared an unlawful practice under Title VII. Later she is rehired, but the employer treats her as a new hire and refuses to grant her any seniority rights as a result of her prior employment. Plaintiff alleges, inter alia, that her current seniority status gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination. Plaintiff's suit fails:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. . . . [The employer's] seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists.

United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). The Court could

find no current violation of Title VII by the employer. The dissent's argument, that her cause of action accrued at the time her seniority rights were recomputed after she was rehired, was unavailing. *Id.* at 561, 97 S.Ct. 1885 (Marshall, J., dissenting).

Admittedly, the differences among the cases are sometimes subtle, but recognizing subtle yet controlling differences is what judging is about.[5] In this case, though neither of the cases discussed above is four-square with the plaintiffs' situation, there is no *Bazemore*-type of ongoing or continuing effect felt by plaintiffs throughout their employment. The effect of that initial accounting method is felt only at the endpoint, when retirement and other specific benefits are finally calculated based on those initial actions. "'The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Del. State Coll. v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980) (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir.1979)). Unless we are to make the PDA apply retroactively to these

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[5] *Compare Shea v. Rice*, 409 F.3d 448, 451-53 (D.C.Cir.2005) (holding that Title VII cause of action exists under *Bazemore* when plaintiff alleged a persistent discriminatory salary structure), *and Anderson v. Zubieta*, 180 F.3d 329, 334-37 (D.C. Cir.1999) (holding continued application of disparate pay policy actionable under Title VII), *with Del. State Coll. v. Ricks*, 449 U.S. 250, 257-58, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980) (holding that loss of teaching position was only the delayed consequence of allegedly discriminatory denial of tenure and was not a current Title VII violation), *and Carter v. West Publ'g Co.*, 225 F.3d 1258 (11th Cir.2000) (holding that dividend payments resulting from earlier allegedly discriminatory practice of offering only men the opportunity to purchase company stock were not actionable wrongs under Title VII).

plaintiffs' pre-PDA accounting—a remedy the Court denied in *Evans*—plaintiffs have failed to show a current violation of Title VII.[5]

C.

Plaintiffs, however, have still a further argument as to why the current calculation of benefits is a violation of Title VII. They describe the NCS system as applied to them as "facially discriminatory," presumably meaning a system that treats similarly situated employees differently. In their brief before the court they make this allegation repeatedly—the quoted term appears something over fifty times in a variety of contextual formulas: e.g., "the seniority system in effect today remains facially discriminatory on the basis of pregnancy," Appellees' Br. at 32; "[AT & T] cannot claim the protection of § 703(h) [of Title VII] for employment decisions made under a 'bona fide' seniority system, because AT & T's NCS system is facially discriminatory," Appellees' Br. at 14. Labeling AT & T's seniority system as facially discriminatory allows plaintiffs to argue that each application of the system to calculate benefits is a new act of discrimination and thus a present violation of Title VII. *See Lorance v. AT & T Techs.*,

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[5] *See Shea v. Rice*, 409 F.3d 448, 451-53 (D.C.Cir.2005) (Williams, J., concurring) ("[*Nat'l R.R. Passenger Corp. v.*] *Morgan* . . . explicitly preserved *Bazemore*, which *Morgan* described as addressing 'a discriminatory salary structure.' 536 U.S. [101,] 112, 122 S.Ct. 2061, 153 L.Ed.2d 106[(2002)]. . . . It would be very odd to use such a term for the facts in *Evans* [or *Lorance v. AT & T Techs.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989)]. . . . The acts [in those cases] had consequences under the employer's non-discriminatory seniority system, to be sure, but they could hardly be described as launching a two-class pay structure based on a forbidden criterion.").

Inc., 490 U.S. 900, 912 n. 5, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989); *Bazemore*, 478 U.S. at 395, 106 S.Ct. 3000.

The problem with plaintiffs' position that the NCS system is facially discriminatory is that it necessarily depends, again, on a retroactive application of the PDA.[7] Plaintiffs allege that, as female employees who took pregnancy leaves prior to the enactment of the PDA, they were treated differently from employees who took leave for other temporary disabilities during the same time period. These two groups, however, are not similarly situated. Employees in the latter group were not female employees who took pregnancy leaves, but were female and male employees who took other types of disability leaves and, under the lawful rules then in effect, were entitled to accrue seniority for the duration of their leaves. Female employees who took pregnancy leaves under AT & T's lawful pre-PDA policy accrued service credit only for a portion of their leaves. As earlier mentioned, though this is objectionable in light of later understandings, because it was legal to distinguish between the two reasons for leaves prior to the PDA the two groups were not similarly situated. The failure to award employees full service credit for their pregnancy leaves could be labeled facially discriminatory only if employees in both groups were similarly situated, e.g., if all were legally entitled to receive full credit for their leaves before the enactment of the PDA. But that would be true only if the PDA were given impermissible retroactive effect.

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[7] *See Gilbert*, 429 U.S. at 140, 97 S.Ct. 401 (describing pre-PDA pregnancy leave practice as involving "no facial gender-based discrimination").

By the same token, distinguishing between one set of female employees who took pregnancy leaves post-PDA and the other set who took pre-PDA pregnancy leaves cannot constitute facial discrimination either, unless the pre-PDA set is entitled to the same benefits as the post-PDA set. That can only be true if the PDA is applied retroactively to the pre-PDA accounting method. In sum, no matter how the situation of these plaintiffs is viewed, the "facially discriminatory" label can only be correctly applied by making the pre-PDA leave accounting unlawful.

AT & T, citing plaintiff's brief, offers a somewhat more technical explanation of "facially discriminatory" and why plaintiffs use of the term is inapplicable: "a policy discriminates *on its face* only 'if "discrimination is apparent from the terms of the policy itself" and does not require "referenc[e to] a fact outside the policy.'" [Appellees' Br.] at 25 (quoting *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 727 (3d Cir.1995))." Reply Br. at 3. AT & T argues that nothing on the face of the NCS system or AT & T's pension plans discriminates on the basis of gender or pregnancy—they simply require that pension benefits be calculated based on NCS dates. *Id.*

Under either view of "facially discriminatory," plaintiffs' argument that each application of the NCS system is a new current violation of Title VII, based as it is on unsubstantiated labeling of current actions by the defendants as "facially discriminatory," is unpersuasive and must fail.

II. Statute of Limitations

The above analysis disposes of the matter before us. The analysis also disposes of another issue in the case relating to the statute of limitations. In terms of

the applicable statute of limitations, absent the 'current violation' theory which as we have seen is not available under current law, plaintiffs' cause of action, if they had one, must have arisen either (1) at the time, pre-1979, when the initial accountings for the pregnancy leaves were made (on the theory such accounting was then illegal), or (2) at the latest when the PDA became effective in 1979 (on the theory that under pre-*Landgraf* rules the statute was retroactive). Either way, the filing of a complaint in 1994 is clearly time-barred. *See* 42 U.S.C. § 2000e-5(e)(1). For that reason, as well as the absence of retroactive effect of the PDA, plaintiffs do not have a cause of action for a violation by defendants of Title VII.[8]

III. *Pallas v. Pacific Bell*

We turn finally to the question of *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir.1991), and its relationship to the outcome in this case. The trial court rested its judgment in plaintiffs' favor on this circuit's decision in *Pallas*, which on similar facts ruled the pre-PDA calculations non-compliant.

The *Pallas* case arose when, in 1987, Pacific Bell instituted a new retirement benefit for management employees called the Early Retirement Opportunity. Plaintiff, otherwise eligible for the benefit, was denied the benefit because under the employer's NCS system (the same system as in this case) she was several days short of the necessary service credit required to obtain the benefit. She had had a pregnancy-related leave in 1972, which under the rules in effect then (pre-PDA) was treated as a personal leave; had it been credited as other disability

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[8] Accord Ameritech Benefit Plan Comm. v. Comm'n Workers of Am., 220 F.3d 814 (7th Cir.2000).

leaves, she would have been eligible for the retirement benefit.

Pallas sued her employer to get the missing credit. The district court dismissed her suit as time-barred—the relevant action, the pregnancy leave, had occurred in 1972 and this was now some fifteen years later. This court on appeal reversed, holding that it was not time-barred:

> In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to the enactment of the [PDA]. While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy. Pallas' complaint states a valid claim under Title VII.

Pallas, 940 F.2d at 1327.

Thus it would appear that Pacific Bell's 1987 use of the 1972 pregnancy leave accounting constituted a new and current violation of Title VII. For the reasons explained above, that necessarily implicates a retroactive application of the 1979 PDA. Stating with certainty the basis for the *Pallas* result is made awkward by the fact that the court did not address the underlying retroactive effect it had given to the PDA. Of course, *Pallas* was decided before the Supreme Court's decision in *Landgraf*, and neither the parties nor the court had the benefit of that clarification of retroactivity law.

The *Pallas* court did cite and discuss with favor the decision by the Supreme Court in *Bazemore v. Friday*. For the reasons explained earlier, we do not believe *Bazemore* is the correct analogy for the case

before us. The Supreme Court in *Bazemore* focused on the pay disparities that remained after the enactment of Title VII: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395-96, 106 S.Ct. 3000. In this case there is no ongoing "pattern or practice" to be pointed to, and no current continuing violation.

IV. Conclusion

There is little doubt that these plaintiffs and others similarly affected by the pre-PDA policies of their employer regarding pregnancy leaves were treated less generously than other employees who took disability leaves. The impact of these policies is even more apparent in the case of an employee, like Ms. Hulteen, who, while on pregnancy leave, was hospitalized for a medical problem unrelated to her pregnancy. The employer, PT & T, denied her the unrelated disability leave to which she would otherwise have been entitled had she not already been on maternity leave.

Deserving as these plaintiffs would seem to be of some accommodation in determining their current benefits, the question before us is not whether the employer owes these plaintiffs an accommodation, but whether the law compels it. Because the PDA cannot be applied retroactively either to invalidate the original accounting scheme for pregnancy leaves or to create a current violation of Title VII by this defendant, and because plaintiffs' suit is not based on a facially discriminatory retirement system and is thus time-barred, and because under controlling law today the *Pallas* precedent cannot be viewed as

binding on this panel, we must reverse the judgment of the trial court and direct that plaintiffs' suit under Title VII be dismissed for failure to state a claim on which relief can be granted.

REVERSED.

RYMER, *Circuit Judge*, dissenting:

I reluctantly part company even though I do not disagree with my colleagues' take on what a correct analysis, on a fresh slate, should look like. As I see it, however, the slate is not clean. Like the district court, I believe that our opinion in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir.1991), controls. The parties do too, though AT & T asks us to hold that *Pallas* has since been undermined because *Pallas* impermissibly gave retroactive effect to the PDA contrary to intervening Supreme Court authority in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), relied upon the "continuing violation" doctrine that the Supreme Court subsequently invalidated in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), and failed to apply the leading Supreme Court case addressing Title VII challenges to seniority systems, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). As I cannot accept these arguments, or play ostrich to *Pallas*, I must dissent.

I

In my view, AT & T's appeal turns entirely on whether *Pallas* is good law. If so, there is no dispute that it is controlling.

Lana Pallas had worked for Pacific Bell since 1967 and had taken leave for a pregnancy in 1972. Pacific Bell counted pregnancy leave for women employees as personal leave rather than as medical leave before the PDA was enacted, and like Pacific Telephone and Telegraph (PT & T), measured service by the "net credited service" system. Pallas applied for retire-

ment benefits in 1987 after Pacific Bell adopted a new retirement benefit called the "Early Retirement Opportunity" for employees with twenty years of accrued service. Pacific Bell determined that Pallas was not eligible because she was several days short of the required amount of service credit as a result of her uncredited, pregnancy-related leave. Pallas filed suit under the PDA. The district court dismissed Pallas's action on the basis of Supreme Court decisions holding that disparate impacts from a bona fide seniority system that is facially neutral must be challenged within the statute of limitations from the time the system is adopted. *See, e.g., Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 911-13, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989) (holding that a facially discriminatory seniority system can be challenged at any time but in a facially neutral system, the discriminatory act occurs only at the time of adoption); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557-58, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) (holding that United was entitled to treat a past act of discrimination as lawful when the employee had failed to file a timely charge with the EEOC, and that the emphasis is on whether a present violation exists instead of on mere continuity). However, we held that these cases were inapposite for two reasons: first, Pallas's complaint was about the criteria adopted in 1987 to determine eligibility for the new benefit program—not a belated attempt to litigate the legality of a pre-PDA program; and second, the NCS used to calculate eligibility under Early Retirement Opportunity was not facially neutral because it discriminates against pregnant women. This is so, we explained, because the system distinguishes between female employees who took leave prior to 1979 due to a pregnancy-related disability, and

employees who took leave prior to 1979 for other temporary disabilities. Thus, in our view, the controlling precedent was *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), where the Court held that pay disparities which existed before, and remained after, enactment of Title VII were unlawful. In sum, we concluded that Pacific Bell's 1987 program "adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act. While the act of discriminating against Pallas in 1972 [when she took a pregnancy-related leave] is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy." 940 F.2d at 1327.

A

AT & T points out that under *Miller v. Gammie*, 335 F.3d 889 (9th Cir.2003) (en banc), this panel is free to overrule *Pallas* if it is undermined by supervening Supreme Court authority. There we held that "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority." *Id.* at 893. AT & T submits that *Landgraf* is later and controlling authority with which *Pallas* is irreconcilable because *Landgraf* makes clear that *Pallas* interpreted the PDA in a way that gave the Act improper retroactive effect. AT & T reasons that the pre-PDA decision not to give full service credit for maternity leaves was legal at the time,[1] yet *Pallas* ruled that reliance on

[1] For this proposition AT & T relies on *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976),

the pre-PDA decisions in a post-PDA benefit determination was actionable because pre-PDA "acts of discrimination" were perpetuated after the Act's effective date. In this way, *Pallas* both imposed new duties on AT & T with respect to its employees' pre-PDA pregnancy-related leaves, and changed the legal consequences of how the company treated pre-PDA pregnancy leaves. As such, AT & T contends, *Pallas* contravenes *Landgraf's* rule that a new statute has retroactive effect if it impairs rights a party possessed when it acted, increases liability for past conduct, or imposes new duties with respect to completed transactions. *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. Finally, it notes, *Pallas* did this without addressing the issue of retroactivity.

I read *Landgraf* as refining, rather than sea-changing, the landscape for the Court explicitly drew upon Justice Story's "influential definition" of retroactivity in *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 766-69 (1814), to make clear how courts should determine whether a statute operates retroactively:

> A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law.

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which held that a policy of compensating for all non-job-related disabilities except pregnancy did not violate Title VII as there was no showing of discrimination. Employees take issue with the assertion that pregnancy discrimination was lawful before the PDA, noting that soon after deciding *Gilbert*, the Court invalidated a policy that favored men over women by depriving women of accumulated seniority when returning from maternity leave. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977).

> Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.
>
> . . .
>
> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 268, 269-70, 280, 114 S.Ct. 1483 (internal citations omitted).

I do not believe that the reasoning or theory of *Pallas* is so irreconcilable with the reasoning or theory of *Landgraf* as to give this panel license to overrule it. *Pallas* held that the actionable conduct was PT & T's decision to discriminate against the employee on the basis of pregnancy when she applied

for, and was denied, early retirement. The decision to deny benefits was made in the post-PDA world. As we emphasized in *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir.1995), if "the law changes the legal consequences of conduct that takes place after the law goes into effect, the law operates on that conduct prospectively." *Id.* at 814. This being the case, and assuming (without deciding) that Congress intended the PDA to have prospective effect only, *Pallas* was premised on a discrete act—the decision to deny a retirement benefit—that gave rise to a current violation of the PDA. Given *Pallas's* finding of a current violation, the Act operated prospectively on *that* decision.

AT & T nevertheless argues that our post-*Landgraf* opinion in *Spink v. Lockheed Corp.*, 60 F.3d 616 (9th Cir.1995) (*Spink I*),*overruled by*Lockheed Corp. *v. Spink*, 517 U.S. 882, 896-97, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996) (*Spink II*), indicates that *Pallas's* interpretation gives retroactive application to the PDA. *Spink* involved 1986 amendments to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, 623(i)(1), and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1054(b)(1)(i), that prohibited employers from excluding new employees over age 60 from participating in their retirement plans. Spink had worked for Lockheed between 1939 and 1950, and began working there again in 1979 at the age of 61. He was excluded by Lockheed's retirement plan because he was over 60. After the 1986 amendments, Spink was allowed to participate in the plan, but was not credited with accrued benefits based on his years of service with Lockheed prior to the amendments' effective date. Spink sued. We held that denying credited service years that an older employee would otherwise have

accumulated was unlawful under the amendments. In so doing, we observed that, "[t]o the extent our interpretation requires employers to include pre-enactment service years in calculating accrued benefits, it applies retroactively." 60 F.3d at 620, n. 1. AT & T seizes upon this remark to maintain that when the Supreme Court reversed our conclusion that Congress intended the statute to have retroactive effect, it necessarily agreed that requiring employers to include pre-enactment service in calculating accrued benefits was a retroactive application. I cannot read so much into the *Spink* opinions. Our observation in *Spink I* did not affect our ultimate decision in that case because the decision was "based on the retroactive intent of the statute manifested in its text." *Id.* The Supreme Court simply disagreed with our construction of the statute. Thus, its analysis—like ours—was limited to *Landgraf's* first step.

In short, *Landgraf* does not control *Pallas's* determination of what constitutes the actionable conduct, nor does it control *Pallas's* conclusion that the NCS system is facially discriminatory. As these are the two dispositive rulings in *Pallas,* I cannot conclude that it is irreconcilable with *Landgraf.*

B

AT & T alternatively posits that *Pallas* relied on the "continuing violation" doctrine, since discredited in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), when it concluded that actions by Pacific Bell within the statute of limitations period "adopted, and thereby perpetuated" acts of discrimination which occurred before the PDA was enacted. In its view, the Supreme Court necessarily rejected *Pallas's* particular theory of timeliness by holding that

discrete discriminatory acts must be challenged within the statute of limitations period for that decision.[2] Thus, AT & T submits, *Pallas* must be overruled because, after *Morgan*, it is clear that each denial of additional service credit to women on maternity leave was a discrete incident which should have been challenged long ago, when it happened—not later, when benefit determinations were made. I disagree.

In *Morgan*, a black male filed charges with the EEOC complaining that he was "consistently harassed and disciplined more harshly than other employees on account of his race." *Id.* at 105, 122 S.Ct. 2061. Some of the acts about which he complained occurred outside of the 300-day period for timely filing. We held that he could sue on claims that would otherwise be time-barred because they were "sufficiently related" to incidents within the statutory period. *Morgan v. National R.R. Passenger Corp.*, 232 F.3d 1008, 1016 (9th Cir.2000). The Court reversed, holding instead that a discrete discriminatory act occurs on the day that it happens, that each incident of discrimination constitutes a separate actionable "unlawful employment practice," and that discrete acts are not actionable if time-barred even if they are related to acts that are not.

Neither the reasoning nor theory of *Morgan* is irreconcilable with *Pallas*. *Pallas* held that the NCS system is facially discriminatory, an issue that was not presented in *Morgan*. Morgan sought damages, which Pallas did not. Further, Morgan proceeded on

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[2] Title VII plaintiffs must file a charge with the EEOC either 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).

the basis of a continuing violation, whereas Pallas relied upon PT & T's decision to deny benefits as the discrete act that was actionable. As the *Pallas* court saw it, this was a current violation, not a continuing one.

AT & T argues that *Morgan* also makes clear that *Pallas's* reliance on *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), was misplaced. This is so, as AT & T puts it, because *Pallas* invoked *Bazemore* to support the notion that post-PDA decisions that give current effect to pre-PDA conduct "perpetuated" discrimination and are therefore actionable in and of themselves. *Pallas*, 940 F.2d at 1327. AT & T submits that *Morgan's* reading of *Bazemore* and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557-58, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), shows that no action can arise out of a time-barred claim absent current unlawful conduct. However, correctly or incorrectly, *Pallas* found the presence of *current unlawful conduct*. Given this construct, nothing *Morgan* says about *Bazemore* or *Evans* makes *Morgan* and *Pallas* clearly irreconcilable.

In *Bazemore*, a government employer had paid white and black workers differently before Title VII was made applicable to public employees; the salary disparity continued thereafter. The Court held that a pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon its effective date for which the employer is liable. To this extent past discrimination was perpetuated, but as *Morgan* reiterated, "'[e]ach week's paycheck that deliver[ed] less to a black than to a similarly situated white is a wrong actionable under Title VII. . . .'"

Morgan, 536 U.S. at 112, 122 S.Ct. 2061 (quoting *Bazemore*, 478 U.S. at 395, 106 S.Ct. 3000).

In *Evans*, United had forced a female flight attendant to resign in 1968 because of its "no marriage" policy. When Evans was rehired in 1972, she was subject to a different policy that denied restoration of seniority to any employee who had previously resigned. The Court rejected her argument that United was guilty of a present, continuing violation of Title VII. It held that United was entitled to treat the past act as lawful once Evans failed to file a timely charge of discrimination, and that the policy applied to her upon her rehiring was applied to male and female employees alike. Of particular importance to *Morgan* was *Evans's* holding that "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period." *Morgan*, 536 U.S. at 112, 122 S.Ct. 2061 (citing *Evans*). This court's "continuing violation" doctrine did not square with this principle, hence the Supreme Court's clarification that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113,122 S.Ct. 2061. At the same time, the Court did not recede from the corollary principle that employees are not barred from filing charges about related discrete acts "so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." *Id.*

Thus, *Morgan's* take on *Bazemore* and *Evans* does not so undermine *Pallas's* take as to render *Pallas* nonbinding. While *Morgan* changed our law on "continuing violations," it did not overrule *Bazemore*. It is not for this panel to say whether *Pallas* read *Bazemore* correctly, or correctly chose *Bazemore* instead of *Evans* as the more apt authority. The only

question for us is whether *Morgan* and *Pallas* are irreconcilable, and I cannot say that they clearly are.

Finally, AT & T notes—and I acknowledge—that the Court of Appeals for the Seventh Circuit parted company with *Pallas* in *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814 (7th Cir.2000). On quite similar facts (Ameritech used essentially the same NCS system as PT & T and likewise did not give service credit to women who took pregnancy-related leaves prior to the PDA), the court opted to follow *Evans* rather than *Bazemore*. We are not, of course, able to overrule one of our own precedents on the footing that colleagues on a different court came out differently.

C

AT & T advances as a third reason for disregarding *Pallas* its failure to cite a controlling Supreme Court precedent, namely, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), which it maintains clearly foreclosed Pallas's claim because *Teamsters* immunizes neutral seniority systems from challenge even when they give present effect to acts that would be thought discriminatory if they occurred today. *Teamsters* was concerned with the "bona fide seniority system" provision of Title VII,[3] and held with respect to this

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[3] Section 703(h) of Title VII, codified at 42 U.S.C. § 2000e-2(h), provides:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

provision that Congressional intent was not to outlaw the use of existing seniority lists simply because the employer had engaged in discrimination prior to passage of the Act.

I do not need to decide whether a panel's failure to consider arguably controlling Supreme Court authority is a proper ground upon which to overrule the law of the circuit because I cannot say that *Pallas* failed to do so. Although the *Pallas* opinion does not cite *Teamsters*, it does cite *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), which in turn cites *Teamsters*. *Lorance*, 490 U.S. at 905, 909, 109 S.Ct. 2261. *Lorance* is a more recent decision in which the Court discussed the difference between a facially neutral seniority system and a facially discriminatory system, holding that a facially discriminatory system may be challenged whenever it is applied whereas a facially neutral system may be challenged only when it is adopted. *Id.* at 911-12, 109 S.Ct. 2261. As *Pallas* found the NCS system to be facially discriminatory, and *Teamsters* involved a seniority system that was otherwise neutral, we are not obliged to depart from *Pallas* just because it failed to cite *Teamsters*.

II

As no acceptable basis appears to overrule *Pallas*, and AT & T offers no reason for distinguishing it, in my view *Pallas* remains binding and controls disposition of this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Aug. 7, 2003]

No. C - 01-1122 MJJ

NOREEN HULTEEN *et. al.*,
Plaintiffs,

v.

AT&T CORP., *et. al*,
Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Before the Court are dual motions for summary judgment. The claims at issue concern alleged violations of both Title VII of the Civil Rights Act and of ERISA, flowing from defendants' denial of service credit to plaintiffs for time spent on disability due to pregnancy. For the reasons outlined below, plaintiffs' motion for summary judgment is GRANTED IN PART and DENIED IN PART, and defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART.

FACTUAL BACKGROUND

1) Procedural History of the Case

The plaintiffs in this case are all women who were employed by Pacific Telephone and Telegraph (PT&T), a Bell System Operating Company and subsidiary of defendant AT&T. After the divestiture of the Bell Operating Companies through the 1984 Modification of Final Judgment, plaintiffs became employees of AT&T. While at PT&T, each of the women took temporary leaves of absence due to pregnancy prior to 1979. Pursuant to policies in place at the time, PT&T did not give "service credit" to women who took temporary disability leaves due to pregnancy during the time they were on leave, while it did offer such credit to employees who were on temporary leave due to other disabilities. As explained below, the amount of service credit indicates the amount of time an employee has been with the company, and the calculation of "Net Credited Service" ("NCS") is critical in determining a host of benefits for which employees can qualify: the amount of pension payments; eligibility for early retirement; qualification for certain voluntary termination packages; job bidding; shift preference; seniority for layoffs, etc. The NCS for each plaintiff calculated by PT&T was carried over to AT&T when they became AT&T employees.

Plaintiffs allege that the failure to credit them with the time they were on disability leave due to pregnancy constitutes discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act, and is a breach of the AT&T benefit plan's fiduciary duty to treat all plan members equally, in violation of the

Employee Retirement Income Security Act (ERISA).[1] Plaintiffs filed suit on their own behalf and on behalf of all others similarly situated on March 20, 2001. Soon after the case was filed, the parties agreed to divide the case into three phases.[2] Phase I comprises an initial determination of liability, based on a joint stipulation of relevant facts. The case is currently situated in Phase I, and the present summary judgment motions are the vehicle to determine initial liability. Phase II will concern secondary liability and class certification issues, should any of plaintiffs' claims remain after summary judgment and subsequent appeals. Phase III will then address the issue of damages.

2) Developments in the Law of Pregnancy Discrimination

When passed, Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of sex, but did not specifically proscribe discrimination due to pregnancy. The Supreme Court examined whether Title VII included discrimination due to pregnancy in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Court found no violation of Title VII where an employee benefit plan failed to cover pregnancy disability. *Id.* at 145-46. The Court refined its position somewhat the following year in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). In *Satty*, the Court distinguished between a benefit plan that refuses to confer a benefit based upon a classification such as pregnancy, the issue in *Gilbert*, and a plan

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[1] These laws are codified at 42 U.S.C. §§ 2000e *et. seq.* and 29 U.S.C. §§ 1001 *et. seq.*, respectively.

[2] *See* Joint Case Management Statement and Proposed Order, filed on July 27, 2001.

that affirmatively imposes a burden, such as the one in *Satty*. The Supreme Court held that an employer may not "burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Satty*, 434 U.S. at 142. In *Satty*, the plan at issue denied sick pay to women on pregnancy disability and eliminated all their job seniority upon return from leave. *Id.* at 137. In contrast to *Gilbert*, the Court in *Satty* held that such a plan violated Title VII.

The tension between *Gilbert* and *Satty* was resolved with the passage of the Pregnancy Discrimination Act of 1979 ("PDA"). In response to the Supreme Court's opinion in *Gilbert*, Congress amended Title VII to include pregnancy under the umbrella of discrimination due to sex. In the wake of the PDA, employee benefit plans that fail to accord women on pregnancy leave the same rights as employees on temporary disability due to other factors are in violation of Title VII.

3) History of Defendants' Net Credited Service System

a. *Pre-1977: The Original Plan*

As early as 1914, AT&T, and its operating companies, used a service crediting system that determined pension benefits eligibility for other programs based upon the length of time an employee was with the company. The tenure of an employee's service in the company was referred to as her "Term Of Employment," or TOE, and was defined as a "period of continuous employment in the service of the Company." (Parties' Joint Stipulations of Fact ISO Their Respective Motions for Summary Judgment ("JSF") ¶ 17.) As part of this method of calculation, a foundational

date for the calculation of "Net Credited Service," or NCS, was maintained for each employee. The NCS date represented the beginning of an employee's TOE.[3] (*Id.* ¶ 18.) An employee's NCS date, however, was not fixed; rather, it was adjusted to account for any interruptions in an employee's service. For instance, if an employee began working on September 1, 1970, and stayed with the company without interruption until September 1, 1971, she would be credited with 365 days of service, and her NCS date would remain September 1, 1970. However, if the employee went on a leave of absence for 25 days, she would be credited for only 340 days of service, and her NCS date would be adjusted accordingly. The new date would then become September 26, 1970. (*See id.*)

Occasionally, an employee's period of service would be interrupted by periods of disability, personal leaves of absence, and other causes. AT&T and its predecessor companies had various policies for granting service credit for these disability related interruptions. The most important for purposes of the present action is PT&T's pre-1977 policy that treated a leave of absence for a pregnancy-related disability as a "personal leave," coupled with the policy that granted a maximum of 30 days service credit for any personal leave, regardless of duration. (*Id.* ¶ 67.) For instance, under this system, an employee who began work for PT&T on September 1, 1970, but who became pregnant and was disabled for 100 days during that year because of the pregnancy received service credit for only 30 of those days, and her NCS date was pushed

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[3] For the purpose of analysis here, TOE and NCS will be used interchangeably, both referring to the amount of time an employee is credited as serving.

back 70 days, to November 10, 1970. In this way, the plan fully accounted for the days she was absent. At the same time, an employee who became temporarily disabled because of a condition unrelated to pregnancy, such as an injury, received full credit for the entire duration of his absence from work. (*Id.* ¶ 68.)

Additionally, some women who became pregnant were forced to go on personal leave before they were rendered disabled by their condition, a policy referred to as "forced leave" (*Id.* ¶ 81.) At the same time, other employees who anticipated the onset of a disability were not forced to go on leave before they felt incapable of working. (*Id.* ¶ 82.)

b. *1977-1979: the Maternity Payment Plan*

On August 7, 1977, PT&T adopted the Maternity Payment Plan, which granted service credit for up to six weeks of disability due to pregnancy and which eliminated the policy of forced leave. (*Id.* ¶ 70.) If the disability lasted longer than six weeks, it became personal leave, with the 30 day maximum credit. (*Id.*) No adjustment was made to the TOE or NCS dates of those women who became disabled due to pregnancy prior to the Maternity Payment Plan. These women were not credited with any service time beyond the 30 day maximum for personal leave, and their NCS dates were not re-adjusted to reflect the addition of any service time. (*Id.*)

c. *1979-Present: The Anticipated Disability Plan And Current Policy of AT&T*

In 1979, as a response to the newly-enacted Pregnancy Discrimination Act, PT&T adopted the Anticipated Disability Plan, which provided service credit for leaves of absence due to pregnancy on the same terms as leaves of absence for other temporary dis-

abilities. (*Id.* ¶ 79.) As with the adoption of the Maternity Payment Plan, no adjustments were made to the service credit or NCS dates of women who had taken leaves for pregnancy under either the prior Maternity Payment Plan or the pre-1977 system. (*Id.*) This plan is currently in effect at AT&T. (*Id.* ¶ 80.)

When the Modification of Final Judgment was adopted, AT&T divested itself of its Bell operating companies. With this breakup, employees of many former operating companies, such as PT&T, became employees of AT&T. (*Id.* ¶ 91.) The MFJ, and the Plan of Reorganization that followed it, required that all pre-divestiture service be carried with the employees regardless of where they were subsequently employed—with AT&T or with the regional companies that were formed in the wake of the MFJ. (*Id.* ¶ 92.)

After the MFJ, some plaintiffs became employees of AT&T, with the same NCS dates and accumulated service time with which they had been credited as employees of PT&T.[4] (*Id.* ¶¶ 29, 40.) While the company no longer treats leave for temporary disability due to pregnancy differently than disability leave occasioned by other factors, at no time did AT&T adjust the NCS dates or amount of service time plaintiffs were credited before they became AT&T employees. (*Id.* ¶¶ 30, 41, 52, 63.)[5] This failure to

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[4] Plaintiffs Linda Porter and Elizabeth Snyder became an AT&T employee prior to the MFJ, in 1980. (JSF ¶ 51, 60.)

[5] In 2000, Snyder received a single 30 day adjustment in her NCS, as an earlier calculation had neglected to give her 30 days of service for the personal leave she took when she became pregnant in 1974. (JSF ¶ 63.) Apart from that correction, to conform to the policy in effect before 1977, Snyder has received no other adjustments to her NCS. (*Id.*)

assign credit for pre-1979 maternity leave is the foundation for the current lawsuit.

LEGAL STANDARD

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c). The moving party bears the initial burden of establishing that there is no genuine issue of material fact. *See id.; Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party does not bear the burden of proof at trial, the initial burden of showing that no genuine issue of material fact remains may be discharged by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Id.* at 325. The moving party is not required to produce evidence showing the absence of genuine issues of material fact. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1990). Nor must the moving party support his or her own motion with evidence negating the nonmoving party's claim. *See id.*

ANALYSIS

This case is particularly well suited for summary judgment, as the parties have stipulated to all the material facts. (*See* JSF *and* Parties' Joint Appendix of Evidentiary Materials ISO Their Respective Motions for Summary Judgment.) The only issue concerns what law to apply to those facts. Plaintiffs argue that the Court should follow the Ninth Circuit's decision in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), while defendants maintain that the holding in *Pallas* has effectively been overruled, and that the Court should instead follow the decision of the Seventh Circuit in *Ameritech Benefit Plan Committee*

v. Foster-Hall, 220 F.3d 814 (7th Cir. 2000), *cert. denied sub nom., CWA v. Ameritech Benefit Plan Committee*, 531 U.S. 1127 (2001).

A. *PLAINTIFFS' TITLE VII CLAIM*

While defendants raise interesting and compelling arguments regarding the applicability of Title VII's anti-discrimination provisions, given the facts of the present case and their resonance with the holding of *Pallas*, the Court is bound by the precedential effect of that decision, and it is obligated to follow *Pallas*. Therefore, as more fully explained below, plaintiffs' motion for summary judgment is GRANTED with respect to the claim under Title VII, and defendants' motion for summary judgment is DENIED.

1) *Pallas v. Pacific Bell*

In the case of *Pallas v. Pacific Bell*, the Ninth Circuit confronted the dismissal of a complaint identical to the present one for failure to state a claim.[6]

> Lana Pallas filed this suit against her employer, Pacific Bell, and its predecessor companies . . . claiming that the company has discriminated against her on the basis of gender and pregnancy. Pacific Bell denied her retirement benefits in 1987 based on a method of calculating employee service time that does not credit pregnancy leaves taken prior to 1979 but credits temporary disability leaves taken during the same period. Pallas brought this action under the Pregnancy Discrimination Act provision of Title

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[6] "The Pacific Bell system at issue in *Pallas* is identical to Defendants' current system challenged here." (Plaintiffs' Motion for Summary Judgment at 9.) Defendants do not dispute that the systems are identical.

VII, 42 U.S.C. §§ 2000e *et seq.*; ERISA, 29 U.S.C. §§ 1001 *et. seq.*; and the California Fair Employment and Housing Act.

940 F.2d at 1325. Because she had taken maternity leave in 1972 and was not credited with service time during her disability, the plaintiff in *Pallas* was two or three days short of the necessary amount of service needed to qualify for an early retirement offer. *Id.* at 1326. The Ninth Circuit found that the seniority system by which her time was calculated was facially discriminatory because it did not include temporary disability due to pregnancy, yet included temporary disabilities occasioned by other causes. In so holding, the Court of Appeals reversed the district court's ruling that the Pacific Bell service program was a *bona fide* seniority system that qualified for safe harbor protection under § 703(h) [42 U.S.C. § 2000e-2(h)]. *Id.* at 1326-27. This latter provision states that for facially neutral seniority systems, "the discriminatory act occurs at the time of adoption and subsequent applications do not constitute continuing violations." *Id.*

In support of its holding, the Ninth Circuit considered several Supreme Court cases upon which the district court had relied in denying Pallas' claim, specifically, *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and found that they were inapposite. *Pallas*, 940 F.2d at 1326. Both *Lorance* and *Evans* held that disparate impacts arising from facially neutral seniority systems must be challenged within the statute of limitations provided by Title VII, a period that begins to run from the time the system is adopted: "with a facially neutral system, the discriminatory act occurs at the time of adoption

and subsequent applications do not constitute continuing violations." *Pallas*, 940 F.2d at 1326 (citing *Lorance*, 490 U.S. at 911-13; *Evans*, 431 U.S. at 557-58). The *Pallas* court found these cases inapposite for two reasons: (1) the retirement program at issue in the case was instituted in 1987 and could not be challenged earlier, so the case was not "a belated attempt to litigate the discriminatory impact of a pre-Pregnancy Discrimination Act program"; and (2) the program at issue was not facially neutral. *Id.* at 1327.

Pacific Bell's leave program neglected to add time for temporary leave for pregnant women but added time for workers temporarily disabled for other reasons. In characterizing this program as not facially neutral, the court held that "[t]he system distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities." *Id.* Therefore, the application of this policy to benefit determinations, such as the 1987 assessment of who qualified for early retirement, was actionable. In reversing the district court decision, the *Pallas* court stated:

> In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act. While the act of discriminating against Pallas in 1972 is not, itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy. Pallas's complaint states a valid claim under Title VII.

Id. As the system in *Pallas* is identical to the NCS system in this case, the denial of the early retirement

offer to Pallas did not result in the calculation of a new NCS date. Instead, Pacific Bell merely applied the NCS date to the date that the plaintiff applied for the early retirement offer and determined that she was just a few days shy of qualifying. Thus, it was not a calculation of a new NCS date that constituted an actionable harm. Rather, the court in *Pallas* held that Pacific Bell's application of a previously calculated NCS date to a determination of benefit eligibility is a discrete act giving rise to a valid claim. This act is the same injury claimed by plaintiffs in the present case: a failure to go back and credit plaintiffs for time on pre-1979 pregnancy leave.

In the view of the *Pallas* court, the adoption of an NCS date calculated through a system that discriminated against women is a perpetuation of that discrimination, regardless of the fact that the differential treatment of pregnant women in computing service credit was not illegal at the time. *Id.* Under *Pallas*, the application of the NCS date incorporates a present act of discrimination; it does not comprise merely the present effects of past discrimination. This distinction is central to defendants' argument.

The Ninth Circuit supported its assessment that application of the NCS constitutes a cause of action for present discrimination through citation to the Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986). In that case, an employer had created two racially segregated workforces, with black workers earning less than whites. After Title VII made such discrimination unlawful, these pay disparities still remained, and the Supreme Court imposed liability even though the discrimination was not illegal at the time the pay structure was established. "Each week's paycheck that delivers less to a

black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96; *cited by Pallas*, 940 F.2d at 1327. In *Bazemore*, the fact that the discriminatory pay structure was not illegal when enacted was immaterial, for the structure was still employed to deny equal treatment to black and white workers. In the same vein, plaintiffs in this case assert that each calculation of benefits using the NCS is actionable. "Plaintiffs' injuries occur when Defendants calculate valuable economic benefits using the challenged NCS system, thereby causing female employees who took pre-PDA pregnancy leaves to receive lesser benefits when they retire than employees who took disability leaves for other reasons." (Plaintiffs' Motion for Summary Judgment at 18.)

2) *Pallas* Incorrectly Applied *Bazemore* and *Evans*

In defendants' moving papers, they invite this Court to examine *Bazemore* closely, in light of the *Pallas* court's reliance on the opinion. Defendants argue that a critical fact in *Bazemore* differentiates it from the situation confronting the Ninth Circuit in *Pallas* and facing this Court in the current case. In *Bazemore*, the Supreme Court determined that the pay structure used by the defendants after Title VII was enacted was identical to the system in place before Title VII, but which had since become unlawful. As seen below, the Supreme Court specifically noted that it was the defendants' conduct in continuing to engage in behavior that had become illegal that constituted a violation of Title VII.

> A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a

> violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be attached.

Bazemore, 478 U.S. at 395. The fact that the Court is discussing the present conduct, and not simply the effects of past acts, is illustrated in the note that follows the above passage:

> Our holding in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* and *Hazelwood* [*School District v. United States*, 433 U.S. 299 (1977)], focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure.

Id. at 396 n.6.

In contrast, defendants in the present case argue that although it employs the same seniority system at issue in *Pallas*, AT&T is not committing a present violation of Title VII in calculating seniority. Defendants argue that AT&T's implementation of the Anticipated Disability Plan ("ADP") is consistent with the PDA, in that employees taking temporary disability leave as a result of pregnancy are credited with the same service time that employees on non-pregnancy disability leave receive. (JSF ¶ 79.) Therefore, defendants argue that this is not a case of continuing discrimination.

In essence, plaintiffs agree with defendants; they agree that the practice to which they were subjected – only receiving 30 days of service credit—is no longer in force. However, plaintiffs do not allege that

the ADP is a "mere continuation" of the pre-PDA leave policy or that defendant is continuing to engage in the unlawfully discriminatory practice, for under AT&T's policy since 1979, pregnant and non-pregnant employees are treated equally. Rather, plaintiffs assert that even though defendants no longer engage in the practice of denying service credit for pregnancy disability, defendants continue to violate Title VII through their refusal to correct their NCS dates. In other words, plaintiffs assert that the discriminatory practice that had become unlawful was changed by the ADP, but defendants did not, and still do not, make this policy retroactive by applying service credit for pre-1979 maternity leaves. (*Id.* ¶ 84.) It is this failure to count pregnancy leave taken before the ADP, and the resulting award of fewer benefits, that constitutes the disparate treatment about which plaintiffs complain, and plaintiffs rely on *Pallas* for the holding that such a failure is actionable. (*See* Plaintiffs' Reply Memorandum ISO Motion for Summary Judgment ("P. Reply") at 5.)

Defendants respond to plaintiffs' argument by challenging the legal foundation of the *Pallas* decision. In their view, the *Pallas* court misapplied *Bazemore's* current acts analysis to a claim that sought damages for the present effects of a past practice. Instead, defendants argue that the analysis set forth by the Supreme Court in *Evans* provides the appropriate framework for considering plaintiffs' claim. (*See* Defendants' Reply ISO Motion for Summary Judgment ("D. Reply") at 3-4.)

In *United Air Lines, Inc. v. Evans*, the Supreme Court confronted a policy analogous to the one at issue here. 431 U.S. 553 (1977). Prior to 1968, United Airlines had a policy that refused to permit its female

flight attendants to be married, and when the plaintiff Evans married in 1968, United forced her to resign. Although case law later determined that this policy was in violation of Title VII, Evans failed to challenge her termination within the applicable statute of limitations. United changed its policy in 1968, and eventually re-hired Evans in 1972. Upon her re-hiring, however, United considered Evans an entirely new employee and denied any service credit for the time she had been employed prior to termination. United made this decision pursuant to a policy that denied recapture of prior service by any former employee, regardless of sex or reason for termination. The plaintiff alleged, however, that denial of past credit, when coupled with the fact that she was forced to resign for a discriminatory reason, "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557.

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination.
>
> * * * *
>
> United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation.

* * * *

> [A] challenge to a neutral system may not be predicated on the mere fact that a past event which has no legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h).

Id. at 558-60 (emphasis original) (citations omitted). By stating that Evans's forced termination "has no legal significance," the Supreme Court necessarily determined that because Evans failed to challenge her discharge in 1968, the statute of limitations ran on her claim and precluded raising her illegal termination at a later time. Thus, it makes no difference why Evans was terminated, as discharge for an unchallenged discriminatory reason is legally equivalent to termination for a nondiscriminatory reason. *Id.* at 557.

The application of the Supreme Court's holding in *Evans* to the case presently before the Court is obvious, according to defendants. Defendants argue that the pre-1979 policy not to credit plaintiffs with service time for disability due to pregnancy was legal under *Gilbert v. General Electric Co.*, 429 U.S. 125 (1976). Even if this policy were actionable, the time to raise a claim would be within 300 days of the decision not to credit service, a decision contemporaneous with the pregnancy leave. (*See* D. Reply at 1-2) (citing JSF ¶¶ 19, 28-29, 37, 39-40, 50-51, 59-60)); *see also* 42 U.S.C. § 2000e-5(e)(1). Alternately, the time to challenge would be after the 1979 adoption of the

ADP, when it was clear that pre-1979 maternity leave would not be credited. Since no challenge to this policy was raised until June 1994 at the earliest, defendants argue that plaintiffs' claims are all time barred, and thus, without legal significance.[7] Moreover, since the current NCS system does not discriminate between people who take disability leave for pregnancy and those who take disability leave for other reasons, it can be classified as neutral under the PDA. According to § 703(h) of the Act, (42 U.S.C. § 2000e-2(h)), the fact that calculations under a system that is neutral in operation may serve to perpetuate discrimination does not constitute an unlawful practice, so long as it is not done with an intent to discriminate. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977) ("[W]e hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.").

In support of their contention that *Pallas* was wrongly decided, defendants cite to the Court the Seventh Circuit's holding in *Ameritech Benefit Plan Committee v. Foster-Hall*. As with *Pallas*, the facts of *Ameritech* are essentially the same as the those in the present case.[8] Prior to the PDA, Ameritech's NCS system counted only 30 days of a temporary leave due to pregnancy toward an employee's time of service, a calculation that affected pension benefits, early retirement, and similar programs. *Ameritech*, 220 F.3d

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[7] *See* First Amended Complaint ¶¶ 44, 57, 68, 79, 82 (describing the dates on which the plaintiffs first filed administrative complaints regarding the computation of their benefits).

[8] *See* Defendants' Motion for Summary Judgment at 8, describing the factual background of *Ameritech* as "almost identical."

at 816-17. At the same time, however, temporary disability leaves for other reasons were credited toward time of service. *Id.* at 817. When the PDA became effective, this policy was changed, and pregnancy disability was credited the same as other leave, but Ameritech did not retroactively credit employees with time for pregnancy leave that had been excluded before the Act was passed. *Id.*

In *Ameritech*, the Seventh Circuit mirrored the Ninth Circuit's identification of *Bazemore* and *Evans* as critical cases to analyze, but the former court reached a different result than the court in *Pallas*. While admitting that the distinction between the holdings of the two cases is rather fine, the Seventh Circuit held that the *Evans* line of cases was more persuasive.

> For a number of reasons, we think that Ameritech has the better of this dispute, although we acknowledge that the line between continuing violations that arise with each new use of the discriminatory act (*e.g.*, the *Bazemore* paychecks) and past violations with present effects (*e.g.*, the *Evans* seniority) is subtle at best. But it is a line the Supreme Court has drawn, and it is our obligation to apply it if at all possible.

Id. at 822-23. Ultimately, the *Ameritech* court did not determine the merits of plaintiffs' claim that the defendant's refusal to apply pre-1979 maternity leaves to net service credit was discriminatory. Instead, the court decided the case on statute of limitations grounds, ruling that the proper time for the plaintiffs to have sued was within the statute of limitations after Ameritech's 1979 modification of the NCS system to conform to the PDA.

> Here, the women knew the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off. No later than the time when Ameritech amended its plan in response to the PDA, they knew that their NCS had not been amended. . . . The time for bringing a complaint was therefore long ago, and the district court properly recognized that these employees had sued too late.

Id. at 823. Since the plaintiffs did not file within the statute of limitations provided by 42 U.S.C. Section 2000e-5(e), their action was ruled untimely and was dismissed.

The Seventh Circuit's [sic] also addressed the question of whether the seniority system at issue in *Ameritech* was *bona fide*. Title VII does not define discriminatory effects that flow from *bona fide* seniority systems as unlawful, as long as those effects do not arise from an intent to discriminate. 42 U.S.C. § 2000e-2(h) (§ 703(h)).[9] Applying the test found in *California Brewer's Ass'n v. Bryant*, 444 U.S. 598, 606 (1980), the *Ameritech* court concluded that the NCS system met the requirements of a seniority system. 220 F.3d at 823. It also cited the holding of *International Brotherhood of Teamsters*, 431 U.S. at 352-53, which states that neutral application of a seniority system that perpetuates past discrimination does

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[9] "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are *not the result of an intention to discriminate because of race*, color, religion, sex or national origin[.]" 42 U.S.C. § 2000e-2(h) (§ 703(h)).

not connote intent to discriminate. *Id.* Distinguishing between discriminatory actions and their later effects, the Seventh Circuit held that the discriminatory effects of the NCS system do not support a cause of action. *Ameritech*, 220 F.3d at 823. The only act that could sustain a cause of action in the case was the 1979 decision not to credit pre-PDA pregnancy to time in service, and the statute of limitations for that had long passed. *Id.*

The *Ameritech* court posited another reason that the decision to deny benefits based on a NCS calculation was not actionable or evidence of discriminatory intent: the PDA does not have retroactive application. "Moreover, the PDA has not been treated as a retroactive statute, and so Ameritech would have had no reason to think it had to reshuffle its NCS list after the Act had passed." *Id.* (citations omitted). The cases cited in *Ameritech* support this finding. "While it is clear that Congress intended to change Title VII as it had been interpreted by *Gilbert* and *Satty*, there is nothing in the amendment or in its legislative history to warrant any inference that Congress intended the change to be retroactive." *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1140 (4th Cir. 1980). "Since Congress provided that the [PDA] would take effect on the date of its enactment, there is no basis for applying the 1979 amendment to Schwabenbauer's experiences in 1968-72. The cases relied upon by Schwabenbauer in seeking retroactive application of the amendment to her case are inapposite." *Schwabenbauer v. Board of Ed. of City Sch. Dist. of Olean*, 667 F.2d 305, 310, n.7 (2d Cir. 1981) (citations omitted). "Whitehead's pregnancy-related termination from OG&E occurred nine years before the PDA was enacted, and the PDA is not retroactive." *White-*

head v. Oklahoma Gas & Elec. Co., 187 F.3d 1184, 1193 (10th Cir. 1999).

Defendants supply additional authority to support the proposition that the PDA is not retroactive, including cases from the Ninth Circuit and the Supreme Court. (*See* Defendants' Motion for Summary Judgment at 7.)

> The Civil Rights Act was amended in 1978 to include pregnancy as a factor in the definition of "on the basis of sex." 42 U.S.C. § 2000e(k). Because the facts in this [action] took place before 1978, this case is not controlled by the amendment; accordingly, we do not consider it.

Wambheim v. J.C. Penny Company, Inc., 642 F.2d 362, 363, n.1 (9th Cir. 1981). The Supreme Court has stated that a clear statement of congressional intent is needed for a law to apply retroactively, for in the absence of such clear intent, the rule is that laws are to be applied prospectively only. *Landgraph v. USI Film Products*, 511 U.S. 244, 271-72, 280 (1994). In this latter case, the PDA is offered as an example of a statute that is not retroactive in application.

> [I]n amending Title VII to bar discrimination on the basis of pregnancy in 1978, Congress provided: "Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment." The only Court of Appeals to consider whether the 1978 amendments applied to pending cases concluded that they did not. If we assume that Congress was familiar with those decisions, its choice of language in § 402(a) would imply nonretroactivity.

Id. at 258, n.10 (citations omitted).

Defendants argue that the Ninth Circuit employed *Landgraph*, together with its presumption of non-retroactivity and its use of the PDA as an example of such a presumption in action, to reject the retroactive application of statutory amendments to the Immigration and Naturalization Act. *See Castro-Cortez v. Immigration and Naturalization Service*, 239 F.3d 1037, 1050-51 (9th Cir. 2001). In addition to emphasizing the persuasive force of *Ameritech*, defendants also argue that the reasoning that animates the decision in *Pallas* demonstrates a retroactive application of the PDA, an application that has been rejected by subsequent Supreme Court decisions. (*See* D. Reply at 2-4.)

In making this argument, defendants chiefly rely upon the opinion in *Spink v. Lockheed Corporation*, 60 F.3d 616 (9th Cir. 1995) ("*Spink I*"), which was subsequently overruled by *Lockheed v. Spink*, 517 U.S. 882, 896-97 (1997) ("*Spink II*").[10] In reversing the Ninth Circuit, the Supreme Court found that the Ninth Circuit erroneously concluded that the Age Discrimination in Employment Act ("ADEA"), as extended to retirement plans in the 1986 Omnibus Budget Reconciliation Act ("OBRA"), could be retroactively applied. *Spink II*, 517 U.S. at 897. The Supreme Court held that OBRA was prospective in nature, and not retroactive, and therefore, there was no liability for denial of benefits based on a pre-OBRA seniority calculation. *Id.* at 896-97. Defendants also cite *Landgraph*, 511 U.S. 244, which used the PDA as an example of a statute that is not ret-

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[10] The Ninth Circuit's analysis of the ADEA and its application to the factual situation in *Spink* was similar to the analysis of the PDA and the facts present in *Pallas*. *Compare Spink I*, 60 F.3d 616 *with Pallas*, 940 F.2d 1324.

roactively applied. *Id.* at 258 n.10. Applying these decisions to the present case, defendants argue that the Pregnancy Discrimination Act is prospective in nature, and that the court in *Pallas* applied the statute retroactively, an application since prohibited by *Lockheed v. Spink*. (*See* D. Reply at 2-4.)

While defendants' arguments have great logical and legal force, in order to apply them to the present case, this Court must determine that in *Pallas*, the Ninth Circuit applied the PDA in a retroactive manner. There are two impediments to such a finding, however. The first is the fact that the *Pallas* decision is silent with respect to the issue of retroactivity. In contrast to its decision in *Spink I*, which explicitly held that OBRA was retroactive, the Ninth Circuit makes no mention of the issue of retroactivity in *Pallas*. *Compare Spink I*, 60 F.3d at 620 n.1 ("To the extent that our interpretation requires employers to include pre-enactment service years in calculating accrued benefits, [OBRA] applies retroactively.") *with Pallas*, 940 F.2d 1324. The second is the fact that in *Pallas*, the Ninth Circuit found a present violation of the PDA. The court clearly stated that the 1987 adoption of a policy applying a benefits calculation made prior to the enactment of the PDA gave rise to a cause of action in 1987. *Pallas*, 940 F.2d at 1327. Because the court in *Pallas* made no mention of retroactivity and found a present violation of Title VII on an essentially identical record, this Court cannot find that the Supreme Court's decision in *Spink II* permits a departure from the holding of *Pallas*.

3) The Effect of *Pallas* Upon this Court

As reflected in the discussion above, defendants invite the Court to depart from the holding of *Pallas*. Their argument has three bases. First, the present

case, as was *Pallas*, is not a case of current acts of discrimination; it concerns the present effects of past discrimination. For this reason, *Bazemore* is inapplicable, and the Supreme Court's holding in *Evans* controls. Second, the decision of the Seventh Circuit in *Ameritech*, on similar facts, supports defendants' contention that *Pallas* was wrongly decided. Third, the *Pallas* opinion involves a retroactive application of the PDA, and subsequent decisions of the Ninth Circuit and the Supreme Court have held that this type of retroactivity is erroneous.

Absent the *Pallas* court's discussion of *Bazemore* and *Evans*, the Court would be free to undertake its own assessment regarding which case is more applicable to the current set of facts. However, despite defendants' cogent analysis of these cases and citation to *Ameritech*, the fact remains that *Pallas* is a decision of the Ninth Circuit with binding effect upon this Court.

When faced with a conflict between the law of this circuit and the law of another, the Court must follow the law of this circuit. *Gardner Construction Co. v. Assurance Co. of America*, No. C 99-1810 MJJ, 2000 WL 1677959, *4 (N.D.Cal. 2000) ("Given the choice between binding precedent and persuasive precedent from another circuit in open disagreement with this circuit's law, this Court must adhere to the former.") District courts are bound by the law of their own circuit; "[t]hey are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be." *Hasbrouck v. Texaco*, 663 F.2d 930, 933 (9th Cir. 1981). This Court may not overrule a decision of the Ninth Circuit in the absence of an intervening Supreme Court decision that undermines the existing precedent, and both cases

are closely on point. *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992); *United States v. Lancellotti*, 761 F.2d 1363, 1366-67 (9th Cir. 1985).

Defendants would argue that the ruling of *Lockheed v. Spink*, when viewed in connection with the opinion in *Landgraf*, is an example of such a intervening Supreme Court decision, but the Court is not convinced that the former case is sufficiently on point to justify setting aside the clear holding of *Pallas*, especially in light of the fact that *Pallas* found a present violation of Title VII on essentially identical facts to the ones before the Court in the present action.

For this reason, *Pallas* remains binding upon this Court, and based on that decision, plaintiffs in the present case have adequately stated a claim under Title VII for discrimination due to pregnancy. Therefore, plaintiffs' motion for summary judgment is GRANTED, and defendants' motion for summary judgment is DENIED as to claim one, violation of Title VII.

B. *PLAINTIFFS' ERISA CLAIM*

In addition to a cause of action under Title VII, plaintiffs claim that the denial of service credit for pre-1979 pregnancy leave constitutes a violation of the Employee Retirement Income Security Act ("ERISA"). Specifically, plaintiffs allege that the decision not to credit pre-1979 pregnancy leave in the NCS system is a breach of defendants' fiduciary duties to plaintiffs, since defendants have failed "to act solely in the interests of the participants and beneficiaries of those plans with respect to those plans as required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)." (First Amended Complaint ¶ 97.) Plain-

tiffs allege that the denial of credit manifests an application of the terms of the NCS system in a discriminatory manner, or in a manner contrary to law, and that it represents a wrongful denial of benefits. (*Id.* ¶ 98.)

For support, they again turn to the decision in *Pallas*, which states that a benefit plan's calculation of service time to determine eligibility for early retirement "is an act subject to review for breach of fiduciary duty." 940 F.2d at 1327. The entire discussion that the Ninth Circuit devoted to the issue of Pallas's ERISA claim is contained in the following section.

> Pallas has also stated a claim cognizable under ERISA. Pallas challenges the manner in which the Early Retirement Opportunity program was applied to her. Calculation of the service term for purposes of eligibility in the program is an act subject to review for breach of fiduciary duty. *Meinhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496, 1502-03 (9th Cir. 1984). Pallas urges that Pacific Bell breached its fiduciary duty by failing to act in the interests of plan participants. Discrimination constitutes a fiduciary breach for purposes of ERISA. *See, e.g., Eiser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813, 104 S.Ct. 67, 78 L.Ed.2d 82 (1983). The allegations in the complaint are sufficient to support an ERISA claim.

Pallas, 940 F.2d at 1327. Plaintiffs assert a similar claims of breach of fiduciary duty in the present case, and in support they rely on *Pallas* for its statement that such a claim can be founded upon ERISA.

Essentially, plaintiffs are alleging discrimination in determination of plan benefits, so the success of their breach of fiduciary duties claim rises or falls on the merits of their claim for discrimination, as the plaintiffs themselves make clear. "[I]f this Court determines here that the Plan fiduciaries' failure to award additional service credit to Plaintiffs for their pre-PDA pregnancy leave violates Title VII, such fiduciaries would not be acting solely in the interest of Plan participants and beneficiaries, and thus would violate ERISA's fiduciary provisions." (P. Reply at 11.) *See also Ameritech*, 220 F.3d at 825 ("Ameritech's decision to use NCS to calculate time of employment cannot evidence an intent to discriminate if the NCS system itself has passed muster under the antidiscrimination laws."). In addition to their argument that NCS calculations do not support a claim for violation of Title VII, defendants advance additional procedural and substantive reasons that plaintiffs' ERISA claims fail as a matter of law.

Defendants content [sic] that the relevant act in question is not a payment of lower benefits (as in *Bazemore*), but the decision not to credit pregnancy leave in NCS. This decision was made at the time the leave was taken, and with each plaintiff, the decision is over 20 years old. Alternately, defendants maintain that the relevant act is the decision to adopt the Anticipated Disability Plan in 1979. In adopting this policy, defendants (and the predecessor companies) chose not to apply the PDA retroactively and not to give credit for maternity leaves taken before that time. In either case, the statute of limitations for plaintiffs' ERISA action had long since run by the time plaintiffs filed suit, so the action is time barred. *See* 29 U.S.C. § 1113(2) (providing a three-year statute of limitations for breaches of fiduciary responsibility, commencing

on the earliest date on which plaintiff had actual knowledge of a breach or violation).

In response, plaintiffs assert that they did not have actual knowledge that NCS would be applied in a discriminatory manner until the 1990s. (Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 18.) This argument is unconvincing, given the following facts: (1) plaintiffs were aware how the NCS system functioned; (2) they knew that they would not be credited with service time when they went on pregnancy leave; (3) they were aware that their NCS dates had been adjusted to reflect the denial of service credit during their absence from work; and (4) they knew that their NCS date traveled with them from PT&T to AT&T. (*See, e.g.* JSF ¶¶ 3, 27-31, 37, 40, 42, 48, 51, 53, 60, 61.)[11]

For this reason, plaintiffs' ERISA claim fails as a matter of law. The precedential effect of *Pallas* does not alter this result. While that decision stands for the proposition that a discriminatory calculation of a service term is sufficient to support a cause of action under ERISA, nowhere does it state that such a cause of action, once properly pled, is immune to the statute of limitations defense provided by ERISA itself. *See Pallas*, 940 F.2d at 1327; 29 U.S.C. § 1113(2).[12] What the case does establish, however, is that the date of the violation for an ERISA claim is

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[11] The latest date for any of these facts is 1984, when named plaintiffs Hulteen and Collet became employees of AT&T; the other two plaintiffs became AT&T employees in 1980. (JSF ¶¶ 29, 40, 51, 60.)

[12] As the statute of limitations issue disposes of plaintiffs' ERISA claim, the Court need not address defendants' other arguments related it.

the adoption of the policy that allegedly constitutes a breach of fiduciary duty.

> In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to enactment of the Pregnancy Discrimination Act. While the act of discriminating against Pallas in 1972 is not, itself, actionable [in the context of Title VII], Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy.

Id. at 1327. Pallas filed her complaint on June 27, 1989, well within the three-year statute of limitations period provided by ERISA,[13] so although the Ninth Circuit found that she stated a cognizable claim under the statute, the court did not address whether such claims are immune from statute of limitations challenges.

In the present case, as in *Pallas*, the relevant act for plaintiffs' ERISA claim is the adoption of the policy not to credit pre-1979 pregnancy leave to employees' NCS. The latest arguable date that this policy was adopted is 1979, in the wake of the PDA, when the decision was made not to credit women retroactively for pregnancy leave. Any complaints under ERISA needed to be filed within three years of the 1979 adoption of that policy. *See Ziegler v. Connecticut General Life Ins. Co.*, 916 F.2d 548 (9th Cir. 1990). As demonstrated in the First Amended Complaint, the earliest claim was filed in 1994, long after the statute of limitations had run on any such claims.

---

[13] The Court takes judicial notice of the docket report in *Pallas v. Pacific Bell, et. al.*, No. 89-2373, heard by Judge Jensen of this Court.

(*See* First Amended Complaint ¶¶ 44, 57, 68, 79, 82.) Since the statute of limitations bars these claims as a matter of law, defendants' motion for summary judgment is GRANTED and plaintiffs' motion for summary judgment is DENIED with respect to these claims.

CONCLUSION

Due to the weight this Court must accord to the Ninth Circuit's opinion in *Pallas*, plaintiffs have established that they are entitled to judgment as a matter of law on their allegations of a violation of Title VII claims, and the case shall proceed to Stage II on that claim. On the other hand, defendants have successfully established as a matter of law that the statute of limitations eliminates plaintiffs' claim for breach of fiduciary duty under ERISA, and they are entitled to summary judgment as to that claim. For these reasons, plaintiffs' motion for summary judgment is GRANTED as to claim one, violation of Title VII, and DENIED as to claim two, breach of fiduciary duty under ERISA, and defendants' motion for summary judgment is DENIED as to claim one, and GRANTED as to claim two.

IT IS SO ORDERED.

Dated: August 6, 2003

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 04-16087

NOREEN HULTEEN; ELEANORA COLLET, ARMA HORTON; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,
Plaintiffs-Appellees,

v.

AT & T CORPORATION,
Defendant-Appellant.

July 19, 2006

Before MARY M. SCHROEDER, *Chief Judge*.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

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[1] Judges Kleinfeld and Rawlinson are recused.

APPENDIX E

FEDERAL STATUTUE

42 U.S.C. § 2000e: Definitions

* * * *

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

* * * *

[Note] Effective Date of 1978 Amendment; Exceptions to Application

Section 2 of Pub.L. 95-555 provided that:

"(a) Except as provided in subsection (b), the amendment made by this Act [amending this section] shall be effective on the date of enactment [Oct. 31, 1978].

"(b) The provisions of the amendment made by the first section of this Act [amending this section] shall

not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act [Oct. 31, 1978] until 180 days after enactment of this Act."

OPPOSITION BRIEF

(3)

No. 07-543

IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

The Ninth Circuit held that AT&T violated Title VII when, in calculating respondents' retirement benefits, it deducted time from their terms of employment for pregnancy disability leaves taken before the effective date of the Pregnancy Discrimination Act, while simultaneously granting employees full credit for all other temporary disability leaves taken during the same period. The question presented is:

Whether Title VII permits an employer, when setting retirement benefits, to discriminate between women who took pregnancy disability leaves before the Pregnancy Discrimination Act came into effect and other employees who took any other kind of temporary disability leave during that same period.

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STATEMENT OF THE CASE

The Pregnancy Discrimination Act ("PDA") of 1978 amended Title VII to clarify that discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" is discrimination "because of sex." PUB. L. NO. 95-555, § 995, 92 STAT. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)). The PDA further provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." *Id.*

Nevertheless, when AT&T[1] calculated respondents' pension benefits upon their retirements, it deducted time from their terms of employment for pregnancy disability leaves they took prior to the PDA's effective date (April 29, 1979). AT&T, however, granted full credit to retiring employees who took leaves for any other temporary disability during the same period. The Ninth Circuit, applying this Court's fresh guidance on the issue of when actionable discrimination occurs, held that AT&T's retirement-day decisions to award lesser pensions to women who took pre-PDA pregnancy leaves than it awarded to other similarly situated employees constituted an unlawful employment practice under Title VII.

1. When certain AT&T employees retire, AT&T awards them pension benefits. The amount of an employee's pension benefits, which AT&T does not calculate until retirement, is determined by his or her "term of employment"—that is, the length of time the employee worked for the company, adjusted for any

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[1] Respondents were initially employed by Pacific Telephone and Telegraph until either 1980 or 1984, when they were transferred to AT&T. For the sake of convenience, respondents' employer will be referred to as AT&T throughout.

leaves of absence for which the company does not give credit.

At all times relevant to this case, AT&T chose to calculate terms of employment according to its generalized seniority system, which it calls the Net Credited Service ("NCS") system. Under that system, AT&T gives employees full employment credit for all types of temporary disability leaves taken prior to the PDA's effective date, except one: pregnancy. Even today, when AT&T calculates women's pensions, it deducts from their terms of employment all time away from work beyond 30 days for pregnancy disability leaves prior to 1977, and all time beyond 72 days for certain pregnancy leaves taken between 1977 and 1979. Accordingly, when women who took (often forced) pregnancy leaves before April 29, 1979 retire, AT&T awards them smaller pensions than all other similarly situated employees who took any other type of temporary disability leave prior to that date.

There is no overriding company policy or principle of law that would preclude AT&T from giving its retiring employees full credit for their pre-PDA pregnancy disability leaves. Indeed, the record in this case shows that when its employees retire, AT&T has the power to correct errors in the NCS dates used to calculate terms of employment or to adjust such dates to comply with legal requirements. For example, on March 1, 2000, AT&T's Pension Plan Administrator informed respondent Elizabeth Snyder that AT&T was adjusting her NCS date to credit her with 30 days out of her 97 days of pregnancy leave, the amount that she would have received for personal leave time in 1974 if the policy then in effect had been correctly applied to her at the time of her pregnancy leave.

2. Respondents are women who worked for AT&T and took pregnancy disability leaves between 1968 and 1976, as well as the union that represents AT&T's non-management employees. At the time of filing their complaint, all but one of the individual respond-

ents had terminated their long-term employment with AT&T; the final woman's retirement was impending.[2]

Respondent Noreen Hulteen took pregnancy leave in 1968-69, and was then hospitalized for a medical condition requiring surgery after giving birth. She missed a total of 240 days of work due to her pregnancy and surgery, but AT&T gave her only 30 days of NCS credit for personal leave time. Thus, when Hulteen retired in 1994, AT&T set her pension benefits by excluding 210 days that it would have credited if she had initiated her leave because of any disability besides pregnancy.

Respondent Eleanora Collet retired on December 31, 1998, after working at AT&T since August 30, 1965. She took two pregnancy leaves totaling 319 days in 1965 and 1975-76. Accordingly, when AT&T calculated her term of employment for purposes of setting her pension payments, it excluded 261 days from her total service, thus reducing her pension benefits.

Respondent Elizabeth Snyder terminated her employment with AT&T on April 28, 2000, after working for the company since May 23, 1966. Ms. Snyder took 97 days of pregnancy leave in 1974. When she retired, AT&T excluded 67 days from her pension calculation, denying her pension benefits based on this time away from work.

3. Respondents filed timely charges with the EEOC, claiming that AT&T discriminated against them in setting their retirement benefits. After receiving right-to-sue letters, respondents sued AT&T, alleging that its decision to pay them smaller pensions because of their pregnancy disability leaves constituted an unlawful employment practice under Title

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[2] Respondent Linda Porter began working at AT&T in 1967. She joined this action anticipating her impending retirement and AT&T's imminent exclusion of her pregnancy leave from the computation of her pension benefits.

VII and violated certain provisions of ERISA. The district court granted summary judgment to respondents on their Title VII claim. Pet. App. 106a-23a. The district court reasoned that AT&T's actions mirrored those that the Ninth Circuit found unlawful in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992), and that "*Pallas* remains binding on this Court." Pet. App. 123a.

4. Before the extent of AT&T's financial liability under Title VII could be determined, AT&T took an interlocutory appeal. A three-judge panel of the Ninth Circuit reversed the district court's grant of summary judgment for respondents. It declined to follow *Pallas*, contending that *Pallas*' holding gave retroactive effect to the PDA, and that this retroactivity was impermissible in light of this Court's intervening decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). Pet. App. 82a-85a. Judge Rymer dissented, asserting that nothing in *Landgraf* undercut the *Pallas* court's conclusion that the employer violated Title VII by "deny[ing] [the retiring plaintiff] benefits in the post-PDA world." Pet. App. 91a. Because the employer's "discrete act—the decision to deny a retirement benefit—[] gave rise to a current violation of the PDA," there was no need to consider whether the PDA applies retroactively. Pet. App. 91a.

5. On rehearing en banc, the Ninth Circuit reinstated the district court's grant of summary judgment in favor of respondents. Applying *Bazemore v. Friday*, 478 U.S. 385 (1986), and the guidance in this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), which had come down after the three-judge panel's opinion, the en banc panel's eleven-judge majority held that AT&T's discriminatory pension-setting decisions constituted unlawful employment practices that occurred when the pensions were set. Pet. App. 10a-11a. The fact that AT&T had previously forecast to respondents that they would not receive credit for their pregnancy leaves when their retirement benefits were later set

was irrelevant. "[T]he *calculation* of benefits" when employees retire is what triggers Title VII, and that calculation takes place long after the effective date of the PDA. Pet App. 11a.

The en banc dissent argued that respondents' Title VII claim was invalid because, by refusing to give respondents credit for pre-PDA pregnancy leaves, AT&T merely gave present effect to past discrimination—discrimination that may have been legal at the time. Pet. App. 63a. Drawing on this Court's decision in *United Air Lines v. Evans*, 431 U.S. 553 (1977), and interpreting *Ledbetter*'s guidance differently than the majority, the dissent asserted that the only relevant actions in this case were the actions AT&T took in the 1960's and 1970's. AT&T's calculation of respondents' pension benefits, in the dissent's view, was entirely neutral. Pet. App. 44a.

REASONS FOR DENYING THE WRIT

AT&T asks this Court to consider whether employers violate Title VII when they give smaller pensions to retiring women who took pregnancy disability leaves before 1979 than they award to other employees who took any other kind of disability leaves. This Court has twice denied certiorari on this very issue. The most recent denial (in 2001) occurred after the Seventh Circuit created the conflict with the Ninth Circuit that serves as the basis for AT&T's petition. *See Ameritech Benefit Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), *cert. denied*, 531 U.S. 1127 (2001); *Pallas v. Pac. Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992).

There is even less reason now for review of this issue. Although the Seventh and Ninth Circuits squarely disagreed over the question presented in 2001, this Court's intervening decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), refines a major component of the controlling legal

framework and thus invites lower courts to reassess their positions. The interlocutory decision below is the only court of appeals decision thus far to do so. Moreover, it comports with *Ledbetter*'s guidance that a Title VII claim arises at the time of the relevant compensation-setting decision (in this case, when petitioners' pension was calculated years after the effective date of the PDA), and with this Court's recognition that a discriminatory compensation policy gives rise to a new Title VII claim each time it is implemented. Finally, even if AT&T were correct that the decision below contravenes *Ledbetter* because AT&T's pension-setting policy merely gives present effect to past discrimination, certiorari still would not be warranted because Congress currently is considering legislation to overturn *Ledbetter* and to establish a new statutory definition of when compensation-related Title VII violations occur. If that legislation fails to become law, and if AT&T's unsupported (and empirically dubious) suggestion that many more lawsuits like this are bound to arise proves correct, this Court will have ample opportunity to resolve any split of authority that develops then—without any prejudice to AT&T's ability to continue litigating this case to an appropriate final judgment.

I. The Ninth Circuit Correctly Held That AT&T's Pension-Setting Calculations Violated Title VII.

A. The Ninth Circuit Correctly Applied This Court's Newly Clarified Distinction Between Present Compensation Discrimination and a Neutral Act That Merely Gives Present Effect To Past Discrimination.

1. Title VII makes it an "unlawful employment practice" to "discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment because of such individual's . . . sex," including pregnancy or related conditions. 42 U.S.C. § 2000e-2(a)(1); *see also id.* § 2000e(k). In

implementing this guarantee, this Court recently emphasized the necessity of "identify[ing] with care the specific employment practice that is at issue." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2167 (2007).

In particular, this Court's cases distinguish between claims based on current practices that are discriminatory and claims based on currently neutral practices that give effect to past discriminatory or otherwise unsavory actions. The former category is exemplified by *Bazemore v. Friday*, 478 U.S. 385 (1986). There, an opinion for a unanimous Court explained that an employer's discriminatory policy adopted "*prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* [it] became covered by Title VII." 478 U.S. 385, 395 (1986) (Brennan, J., concurring). Thus, this Court held that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under the statute." *Id.* On the other hand, in a line of cases beginning with *United Air Lines v. Evans*, this Court has held that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from . . . past discrimination." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007) (interpreting "[t]he instruction provided" by *United Air Lines v. Evans*, 431 U.S. 553 (1977), *Delaware State College v. Ricks*, 449 U.S. 250 (1980), *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)).

This Court clarified the boundary between these two lines of cases last Term in *Ledbetter*. In that case, Ledbetter proved to a jury "that during the course of her employment several supervisors had

given her poor performance evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment." 127 S. Ct. at 2165-66. There were, accordingly, three points in time when Ledbetter might have alleged that her employer committed an unlawful employment practice under Title VII: (1) in giving her sub par performance reviews; (2) in setting her pay based on those reviews; and (3) in issuing paychecks based on those pay-setting decisions.

This Court held that the relevant unlawful employment practice occurred at the second stage, when the pay-setting decision was made. 127 S. Ct. at 2165, 2169. This Court explained that "[a] disparate-treatment claim [under Title VII] comprises two elements: an employment practice, and discriminatory intent." *Id.* at 2171. An employer violates Title VII at any "particular point in time" when these elements join together to form a discriminatory act. *Id.* at 2169. When an employer sets an employee's pay based on discriminatory performance reviews, it joins discriminatory intent with an act of awarding the employee a certain salary. Furthermore, when, as in *Bazemore*, "an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees." *Id.* at 2173 (citing *Bazemore*, 478 U.S. at 395). But when an employer simply issues paychecks according to a previously and individually established rate of pay, an employer treats an employee differently for a neutral reason—namely, that each employee is entitled to be paid only the amount at which their pay was set.

2. The Ninth Circuit here correctly applied the *Bazemore/Evans* dichotomy, as explicated in *Ledbetter*, to hold that AT&T violated Title VII when

it gave respondents smaller pensions than they would have received if they had taken their temporary disability leaves for any reason other than pregnancy. Setting an employee's pension is a discrete act just like setting her pay. *See, e.g., Maki v. Allete, Inc.*, 383 F.3d 740, 744 (8th Cir. 2004) ("[p]ension checks . . . are based on a pension structure that is applied only once, when the employee retires, and the pension checks merely flow from that single application"). That being so, the Ninth Circuit reasoned that AT&T's pension-setting system "facially discriminates against pregnant women" by distinguishing between "female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities." Pet. App. 9a (quoting *Pallas*, 940 F.2d at 1327). Just as this Court explained that the employer discriminated against Ledbetter when its discriminatory intent joined with the act of setting her pay (but not when it later issued her paychecks), the Ninth Circuit concluded that when AT&T—long after the effective date of the PDA—used its facially discriminatory pension-setting policy to set respondents' retirement benefits at levels lower than other similarly situated employees, it engaged in intentional discrimination in violation of Title VII. Pet. App. 11a.

AT&T insists that its pension-setting decisions here did not constitute unlawful employment practices because all it did in setting the levels of respondents' pension benefits was to rely in a neutral manner "on historical facts"—namely, adjusted NCS dates—created by discriminatory policies that were "legal at the time." Pet. for Cert. 18. According to AT&T, therefore, the Ninth Circuit improperly "imposed liability on AT&T for failing to *restore* service credit to women who took pre-PDA pregnancy leaves." Pet. for Cert. 21.

In addition to improperly presuming that it was legal prior to 1979 to discriminate in this manner on

the basis of pregnancy,[3] AT&T's argument misapprehends how pension benefits operate and distorts the Ninth Circuit's reasoning. An employee's seniority may matter for many things during her employment, but it cannot affect her pension until she retires. Consequently, the relevant disparate treatment here occurred when "AT&T calculated [respondents'] retirement benefits . . . deliberately choosing to use an NCS date that would deprive [them] of benefits received by those who were not 'affected by pregnancy' by excluding earlier pregnancy leave from the . . . calculation of benefits." Pet. App. 19a (quoting 42 U.S.C. § 2000e(k)). Up until that moment, AT&T could have "credited the applicable number of days [from respondents' pregnancy leaves] to each plaintiff's NCS date when it calculated her benefits," Pet. App. 21a, just as it adjusted the NCS date that it had previously advised respondent Snyder it intended to use for calculating her benefits. ER R 58 ¶ 63. Respondents' prior service history did not predetermine AT&T's present-day pension-setting decisions any more than Ledbetter's discriminatory performance reviews pre-determined the salary-setting decisions this Court held actionable in that case.

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[3] AT&T's policy was arguably an unlawful employment practice under Title VII even prior to the passage of the PDA. In 1977, this Court held that a "policy of denying accumulated seniority to female employees returning from pregnancy leave violates § 703(a)(2) of Title VII." *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139 (1977). And the EEOC's 1972 guidelines specifically forbade employers from discriminating in seniority accrual policies between employees disabled by pregnancy and those affected by other temporary disabilities. 29 C.F.R. § 1604.10(B) (1973). To the extent *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), suggested that AT&T's pension-setting system was lawful prior to 1979, "the views expressed in the dissenting opinions in that case . . . should be followed today" because Congress specifically "'overruled' that decision in the [PDA]," making clear that it always had intended Title VII to cover pregnancy discrimination. *Sutton v. United Air Lines*, 527 U.S. 471, 506 n.3 (1999) (Stevens, J., dissenting).

Even if AT&T's suggestion were accurate that its NCS policy when the respondents took their pre-PDA pregnancy disability leaves gave them unambiguous notice that AT&T intended to discriminate against them when it set their pension amounts in the future, that still would not assist AT&T. *Ledbetter* expressly recognized that "there may be instances where the elements forming a cause of action span more than 180 days" (Title VII's limitations period). 127 S. Ct. at 2171 n.3. When an employer "forms an illegal discriminatory intent towards an employee but does not act on it until 181 days later," the "charging period would not begin to run until the employment practice was executed on day 181 because until that point the employee had no cause of action." *Id.* At the very best, AT&T is in the same position as the hypothetical employer in *Ledbetter*. AT&T intended to discriminate against respondents when it advised them that it would deduct time from their pregnancy disability leaves when dispensing future seniority-based employment benefits, and AT&T put that discriminatory intent into practice when it established the amount of pension benefits they would actually receive.

For much the same reason, AT&T's suggestion that the Ninth Circuit "sought intentionally to evade *Evans*," Pet. for Cert. 17, lacks merit. In *Evans*, United Air Lines fired Evans because of her sex, giving immediate rise to a mature disparate-treatment claim. But Evans declined to file a claim. United later rehired her, and set her seniority at zero, pursuant to its policy of resetting the seniority clock whenever it rehired any former employee. Evans did not file a claim based on that act either.[4] Instead, Evans

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[4] This Court did not address whether Evans could have made out a claim against United for "the single act of failing to assign her seniority credit for her prior service at the time she was rehired," because she filed her discrimination charge with the EEOC outside the limitation period for challenging that act. 431 U.S. at 557 n.9. This Court held only that Evans could not make out a

brought a claim more than one year later alleging that United violated Title VII by paying her less than she would have received if she had not been fired for a discriminatory reason. This Court rejected Evans' argument, holding that United's issuance of her paychecks merely gave present effect to a past discriminatory firing. *Evans,* 431 U.S. at 558. Having let United's genuine act of discrimination go unaddressed, Evans could not complain of its lingering effects years later with respect to her pay because her salary was a function solely of the company's neutral seniority resetting policy. *Id.*

By contrast, AT&T's mere tallying of days respondents took for disability leave did not have any immediate discriminatory effect on their pensions. Just as a critical note in an employee's file is not actionable until it is given concrete effect in a subsequent pay raise decision, a notation recording disability leave does not give rise to a claim for pension discrimination unless and until the employer gives it discriminatory effect in establishing the worker's pension benefits. Furthermore, AT&T's refusal to credit pregnancy disability leave time in calculating pensions is not a function of any facially neutral seniority rule. To the contrary, AT&T intentionally discriminated between women disabled by pregnancy and other temporarily disabled employees when it adopted a service credit accrual method that denied equal service credit to women who took pregnancy disability leaves. And AT&T acted on precisely this discriminatory intent when it chose to use this policy to calculate employees' pension benefits and gave respondents smaller pensions than their similarly situated coworkers. Accordingly, those pension-setting decisions constituted unlawful employment practices. *See Ledbetter,* 127 S. Ct. at 2173.

Title VII violation for United's issuance of paychecks paying her according to the seniority level it assigned her when it rehired her.

3. It adds nothing to argue, as AT&T does, that the Ninth Circuit "gave impermissible, retroactive effect" to the Pregnancy Discrimination Act in deciding this case. Pet. for Cert. 21. *Ledbetter* makes clear that an employer violates Title VII whenever it applies a facially discriminatory policy to one of its disfavored employees. *See* 127 S. Ct. at 2173. AT&T engaged precisely in such prescribed behavior when it calculated the respondents' pension benefits. That AT&T adopted its facially discriminatory seniority policy "*prior* to the time it was covered by [the PDA] does not excuse perpetuating that discrimination *after* [it] became covered by [the PDA]." *Bazemore*, 478 U.S. at 395. Respondents' claim is directed to actions AT&T took when they retired, long after the PDA became the law, so there is no retroactivity issue here.

B. The Ninth Circuit Properly Recognized That the Seniority System AT&T Used in Setting Respondents' Pensions Also Permits Them to Bring Their Claims.

Even if AT&T's refusals in the 1960's and 1970's to give respondents service credit for their pregnancy disability leaves were the discriminatory acts on which respondents' claims rested, that still would not undermine the Ninth Circuit's decision. In *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), this Court explained that "a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged *at any time*." *Id.* at 912 (emphasis added). "[A] facially discriminatory system . . . by definition discriminates each time it is applied." *Id.* at 912 n.5. AT&T concedes that its NCS seniority system is a "discriminatory polic[y]," Pet. for Cert. 18, and the Ninth Circuit properly recognized that this is facially apparent. Pet. App. 9a.

To be sure, *Lorance* itself involved a facially neutral seniority system, and this Court held, relying on *Evans*, that employees could not challenge current employment decisions based on such a system after

the limitations period running from the system's initial application to them had expired. But even if AT&T's NCS system could somehow be characterized as facially neutral, it would not matter. In response to *Lorance*, Congress passed the Civil Rights Act of 1991. Section 112 of the Act, codified at 42 U.S.C. § 2000e-5(e)(2), establishes a special rule for discriminatory seniority systems, which the *Ledbetter* Court recently made clear does not apply to "other types of employment discrimination" such as pay discrimination. *Ledbetter,* 127 S. Ct. at 2169 n.2. That section provides that a seniority system adopted for an intentionally discriminatory purpose may be challenged "when the seniority system is adopted, when the individual becomes subject to the seniority system, *or when a person aggrieved is injured by the application of the seniority system or provision of the system.*" § 2000e-5(e)(2) (emphasis added). The Ninth Circuit noted that Congress passed this legislation because it "was concerned that, '[t]aken to its logical conclusion, the *Lorance* rule would bar all challenges to present day applications of discriminatory practices in existence when Title VII became law since, under the *Lorance* rule, the deadline for a timely charge would have expired before Title VII became effective.'" Pet. App. at 20a (quoting H.R. REP. NO. 102-40, pt. II, at 23).

At the very least, respondents' suit is precisely the kind of case whose viability Congress meant to ensure. Even if respondents' claims truly concerned AT&T's past maintenance of its discriminatory NCS system instead of its current "term of employment" calculations in its pension-setting decisions, the NCS system is an intentionally discriminatory seniority system subject to the Civil Rights Act of 1991. AT&T's NCS system intentionally discriminated against women inasmuch as it explicitly denied women credit for pregnancy disability leaves, while awarding full NCS credit for all other temporary disability leaves. Consequently, the Civil Rights Act of 1991 enabled respondents to file their claims at the time of their

retirements, when AT&T "appli[ed]" the discriminatory NCS dates to calculate their pension benefits. § 2000e-5(e)(2).

II. Neither the State of Law in Other Federal Courts Nor Any Other Prudential Circumstance Counsels in Favor of Review.

AT&T argues that certiorari is warranted because the Ninth Circuit's decision purportedly conflicts with decisions from the Sixth and Seventh Circuits. It further contends that the question presented is significant because "[m]any large employers treated pregnancy leaves differently than other leaves prior to the PDA." Pet. for Cert. 3. Neither of these arguments withstands scrutiny. Not only is it unnecessary to consider the question presented but it would be unwise to do so without awaiting further developments in this case and in the legal landscape in general.

1. The Sixth and Seventh Circuits have issued decisions holding that employers that calculated pensions in the same manner as AT&T did not violate Title VII. *See Leffman v. Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007); *Ameritech Benefit Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), *cert. denied*, 531 U.S. 1127 (2001). Unlike the Ninth Circuit's decision here, however, the Sixth and Seventh Circuits issued their decisions before this Court refined the *Bazemore/Evans* dichotomy in *Ledbetter*. Consequently, neither court focused, as *Ledbetter* directs, on the "specific employment practice that is at issue" or on when the employer's discriminatory intent "joined" with the act (awarding a smaller pension) that harmed the employees. 127 S. Ct. at 2167, 2171 n.3. Rather, the Seventh Circuit reasoned simply that because the plaintiffs "knew the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off" that "[t]he time for bringing a complaint was . . . long ago." *Ameritech*, 220 F.3d at 823. The Sixth Circuit said even less about exactly when a specific

employment practice at issue occurs that gives rise to a ripe claim for discrimination in setting pension benefits. Quoting a concurring opinion from an earlier case dealing with a different issue, the court of appeals asserted without elaboration that the "plaintiff[] present[s] claims of continuing effects of past discriminatory acts and do[es] not claim discriminatory acts within the statutory time period." *Leffman,* 481 F.3d at 433 (6th Cir. 2007) (quoting *Cox v. City of Memphis*, 230 F.3d 199, 206 (6th Cir. 2000) (Moore, J., concurring)).

Given the opportunity to reconsider these rather skeletal opinions in light of *Ledbetter,* the Sixth and Seventh Circuits may well see the error in their reasoning – namely, that discrimination occurs when employers' discriminatory intent joins with the act of awarding the affected women smaller pensions than other similarly situated employees. Whatever other complaints women such as the respondents may have had when their employers told them they did not receive full NCS credit for their pregnancy leaves, they did not have any claim with respect to *the amounts of their pensions* until those pensions were calculated and awarded.

2. Even if there were merit to AT&T's suggestion that this case really involves nothing more than the present effects of past discrimination, it would still be advisable for this Court to refrain from intervening in light of pending legislation that would definitively resolve this dispute even if this case is characterized on AT&T's terms. In the wake of *Ledbetter*, members of Congress introduced The Lily Ledbetter Fair Pay Act of 2007. The Act, which would cover all claims pending on or after May 28, 2007, H.R. 2831 § 6, passed the House and has been placed on the Senate calendar. It proposes to amend Title VII to state that a claim can be brought for discrimination in compensation "when an individual is affected by application of a discriminatory compensation decision." H.R. 2831, 110th Cong. § 3 (2007). The House Report

explains that the Ledbetter Act "includes benefits as a form of compensation which could trigger the statute of limitations when paid." H.R. REP. NO. 110-237 (2007). Accordingly, to the extent that AT&T is correct that a previous discriminatory alteration to an NCS date resembles the prior discriminatory pay-setting decisions the employer made in *Ledbetter*, the Act would uphold the result reached by the Ninth Circuit and permit respondents to proceed with their suit regardless of the outcome of a Supreme Court decision in this case.

To be sure, the Ledbetter Act states that it "is not intended to change current law treatment of when pension distributions are considered paid." H.R. 2831 § 2. But the House Report explains this language by noting that pension benefits under law are considered paid only once, "upon entering retirement and not upon the issuance of each annuity check." H.R. REP. NO. 110-237. In other words, while the Act would leave in place law governing whether a retired employee can sue an employer based on the receipt of a pension check pursuant to a previously set rate, nothing in this language would change the Act's dictate that an employee may bring a claim for discrimination based on the setting of her benefits at the time of retirement. Respondents in this case each satisfy this proposed rule. Each timely challenged the calculation of their pension benefits at the time of retirement.

3. Finally, all available empirical evidence indicates that the question presented lacks any pressing significance. The number of women potentially affected by the question presented is capped and is necessarily decreasing over time. Only women who took pregnancy disability leave before the PDA took effect on April 29, 1979, and who have continued to work for an employer that awards pensions but refuses to credit such leaves equally to other temporary disability leaves, have any stake in this dispute. This

class of women gets smaller every day, as its members move beyond retirement and pass away.

Furthermore, the number of employers potentially subject to such a suit appears to be quite limited. No *amici* have filed in support of AT&T's petition. Furthermore, over the past sixteen years, the federal courts of appeals have had occasion to decide only five Title VII cases involving the question presented.[5] All five involved telecommunications companies, presumeably because this was one of the only industries that (a) was unionized in the 1960's and 1970's; (b) employed a substantial number of women; and (c) had pension plans then that companies have carried forward to the present day. And even within this group, some employers have changed their pension policies and voluntarily decided to award women such as respondents full retirement benefits. *See, e.g., E.E.O.C. v. Bell Atlantic Corp.*, Nos. 97 Civ. 6723, 98 Civ. 3427, 99 Civ. 5197, 2002 WL 31260290 (S.D.N.Y. Oct. 9, 2002).

AT&T nonetheless asserts, without citing any evidence, that "[m]any large employers treated pregnancy leaves differently than other leaves prior to the PDA." Pet. for Cert. 3. This assertion is hard to square with the fact that it has been primarily telecommunications companies that have been subject to the handful of lawsuits such as this one. But to whatever extent some women affected by policies such as AT&T's may still retire in the future and sue their employers, that circumstance would only reinforce the reasons for denying review here. This case is on interlocutory review (the extent of AT&T's liability, among other things, has not yet been determined), so allowing it to proceed to a final judgment in the district court would not risk prejudicing AT&T. AT&T could bring this issue back to this Court at the close of this case if it wishes. In the meantime, if any new

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[5] In addition to the cases discussed above, see *E.E.O.C. v. Ameritech*, 156 Fed. Appx. 953 (6th Cir. 2005).

cases were brought, other courts would be able to consider the issue in light of *Ledbetter* and any new legislation that is enacted. If any conflict developed, this Court could address it in due course.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

This case presents an important and recurring issue on which the courts of appeals are in direct and acknowledged conflict—whether Title VII is violated when a seniority system gives present effect to a non-actionable past act of discrimination. As the petition demonstrated, this conflict has persisted despite this Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). Indeed, given a chance to reappraise its position in light of *Ledbetter* and conflicting decisions from the Sixth and Seventh Circuits, the majority below chose to evade *Ledbetter*'s holding and maintain the inter-circuit division. In doing so, moreover, it gave the Pregnancy Discrimination Act ("PDA") retroactive effect, creating a further (albeit unacknowledged) split.

Unable to refute AT&T's showing that the criteria for review are met, respondents resort to misstatement and misdirection. To reconcile the decision below with *Ledbetter*, respondents misrepresent the facts of the case—falsely claiming that AT&T "deducted" seniority when it calculated their pension benefits in the 1990s and 2000s. In fact, as respondents themselves conceded below, the service credit determinations that give rise to their claims occurred in the 1960s and 1970s. To justify further percolation of the "current violation" issue, respondents mischaracterize *Ledbetter*, claiming it altered "the controlling legal framework" in a way that will prompt the Sixth and Seventh Circuits to reconsider their decisions. But, any fair reading of *Ledbetter* and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), reveals that the Sixth and Seventh Circuit decisions are correct and that the majority

below circumvented this Court's decisions. Respondents also completely ignore that the decision below gives impermissible retroactive effect to the PDA—in direct conflict with every circuit court that has addressed the PDA's temporal scope.

Hoping to stave off review, respondents offer alternative bases for the decision below. But AT&T's NCS system plainly was not "facially discriminatory"; indeed, respondents' claim to the contrary depends on retroactive application of the PDA, and thus inescapably raises the second question presented. Their alternative claim that the NCS system was adopted with discriminatory intent is flatly time-barred. Ultimately, respondents ask the Court to ignore the conflict—and leave employers subject to conflicting rules governing pension benefits—because of a proposed bill that is stalled in the Senate and subject to a veto threat. None of these gambits should obscure the current split in the circuits, the misapplication of this Court's decisions, the importance of the issues or the necessity for this Court's prompt review.

ARGUMENT

1. The first issue presented is whether an employer engages in a current violation of Title VII when, in making post-PDA benefit determinations, it fails to *restore* seniority that female employees lost when they took pre-PDA pregnancy leaves. The decision below presents *this* issue—not the issue respondents suggest, compare Pet. at i with Opp. at ii—because AT&T denied full service credit to women who took pre-PDA pregnancy leaves shortly after they returned from those leaves, *not* decades later. When women who had taken pre-PDA pregnancy leaves retired, AT&T did not apply pre-PDA leave policies to

calculate their retirement benefits, as the majority below wrongly claimed. Pet. App. 21a-22a. Instead, AT&T calculated each employee's term of employment ("TOE") based on her retirement date and previously-adjusted NCS date; it then used the TOE to calculate the employee's pension. Thus, AT&T's seniority system merely gave present effect to seniority calculations that were made decades earlier and were embedded in gender-neutral NCS dates. It is the lawfulness of this conduct on which the circuits are in conflict.

Recognizing this fact—and that AT&T's continued reliance on pre-PDA service credit decisions is not a new violation of Title VII under *Ledbetter* or *Evans*—respondents resort to blatant misstatements of the facts. They claim that, when they returned from their pre-PDA pregnancy leaves, AT&T merely "advised them that it *would* deduct" service credit for those leaves sometime in the future, and that the loss of seniority did not occur until "AT&T calculated respondents' pension benefits *upon their retirements*." Opp. at 11, 1 (emphases added).[1] These statements are demonstrably false.

The parties' stipulation recites that, after her 1969 pregnancy leave, Hulteen's NCS date was changed "from January 5, 1965 to August 3, 1965." ER R 58, ¶ 28. When the Bell System broke up on January 1, 1984 and Hulteen was transferred from PT&T to AT&T, she "*maintained* the August 3, 1965 NCS date she *had had as an employee of PT&T*." *Id.* ¶ 29 (emphases added). Indeed, "[t]hroughout her employment with PT&T and AT&T, Hulteen periodically received documents that contained the August 3,

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[1] The same mischaracterization is found in respondents' brief in different forms at ii, 2, 3, 4, 12.

1965 NCS date." *Id.* ¶¶ 30-31.[2] Accordingly, respondents conceded below that, after the PDA took effect, AT&T simply "continued to use the NCS date *previously computed* for leave taken before April 29, 1979"—the PDA's effective date—and they challenged AT&T's failure to "*restore*[] time deducted due to pregnancy." See Appellees' 9th Cir. Br. at 10 (emphases added). The parties' stipulation and respondents' concessions directly contradict respondents' assertion that AT&T waited until they retired to "deduct" the time they spent on pregnancy leaves from their TOEs.

Under the actual facts of this case, therefore, respondents cannot equate AT&T's conduct to that of the hypothetical employer described in *Ledbetter*. See Opp. at 11. AT&T did not decide in 1969 to discriminate against respondents in the future, and then wait *three and a half decades* to "put that discriminatory intent into practice." *Id.* Here, "the specific employment practice[s] that [are] at issue," *Ledbetter*, 127 S. Ct. at 2167, were decisions to deny full service credit for pregnancy leaves by adjusting the NCS dates of those who took such leaves. These allegedly "discriminatory...decision[s] [were] made and communicated to" respondents, *id.* at 2169, *in the 1960s and 1970s*. And these decisions affected respondents long before they retired, as NCS seniority was used "for many employment-related purposes, including job bidding, shift preference, layoffs [and] eligibility for certain benefit programs." ER R 58 ¶ 19.

To be sure, respondents' pension benefits were not finally calculated until they retired. But the amount

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[2] The same was true for other respondents. *See* ER R 58, ¶¶ 39-42, 50-53, 59-61.

of benefits each received was merely a function of her TOE, which was determined by calculating the time between her NCS and retirement dates. "The fact that precharging period discrimination"—which in this case was lawful, see *infra*—"adversely affects the calculation of a neutral factor (like seniority) that is used in determining [retirement benefits] does not mean that [each pension-setting decision] constitutes a new violation." *Ledbetter*, 127 S. Ct. at 2174. To the contrary, all respondents have alleged is that AT&T "discriminated against [them] in the past," when it adjusted their NCS dates to deny them full service credit for pre-PDA pregnancy leaves, "and that this discrimination reduced the amount of later [pension benefits]." *Id.* *Ledbetter* and *Evans* make clear that these allegations do not state a claim for a current violation, and respondents cannot escape this fact—and avoid review of the erroneous ruling below—by mischaracterizing AT&T's pension-setting decisions as post-PDA decisions to "deduct" seniority.

In the end, therefore, respondents retreat to the invalid theory the majority embraced below. They argue that their service history "did not predetermine AT&T's present-day pension-setting decisions" because "AT&T could have 'credited the applicable number of days [from respondents' pregnancy leaves] to each plaintiff's NCS date when it calculated her benefits.'" Opp. at 10 (quoting Pet. App. 21a). This is simply another way of saying that AT&T violated Title VII by refusing to restore the seniority respondents lost decades ago. See Pet. App. 20a-21a. And this theory is squarely foreclosed by *Evans*. Pet. at 18-20.

Attempting to show otherwise, respondents disingenuously claim that *Evans* involved the same "paycheck" accrual theory rejected in *Ledbetter*. Opp.

at 11-12. In fact, the precise question presented in *Evans* was "whether the employer [was] committing a second violation of Title VII by refusing to credit [Evans] with seniority" she had previously lost. 431 U.S. at 554; see also *id.* at 556 n.7 (describing relief sought). In *Evans* (as here), seniority was measured by adjusted dates of hire, and loss of seniority affected many aspects of employment beyond wages. *Id.* at 555 n.5. *Evans* held (contrary to the decision below) that *a refusal to restore seniority was not a new violation of Title VII*, for otherwise "a claim for seniority credit" could be substituted "for almost every claim which is barred by limitations." *Id.* at 560.

In short, respondents cannot recast the facts of *Evans* or of this case, and thus cannot disguise the clear inconsistency between the decision below and the decisions in *Evans* and *Ledbetter*. That inconsistency, as well as the acknowledged conflict among the circuits on the precise issue presented in this case, plainly justifies this Court's review.

2. Recognizing this, respondents claim the decision below can be sustained on alternative grounds that do not warrant review. These claims are baseless.

The first alternative rationale, also propounded by the majority below, is that AT&T's NCS system is "facially discriminatory" because it "set respondents' retirement benefits at levels lower than other similarly situated employees." Opp. at 9; see also Pet. App. 9a. But, as AT&T and the dissent below explained, see Pet. at 23-24; Pet. App. 45a, women who took pregnancy leaves prior to the PDA were *not* similarly situated to employees who took paid disability leaves before the PDA: Employees in the latter group were entitled to accrue full seniority during their leaves, while (under AT&T's then-lawful

leave policies) employees in the former group were not. Had the PDA *retroactively* invalidated the lawful distinction between these two groups, they could be deemed "similarly situated"—but the PDA did not.[3]

It is thus no answer to assert that "an employer violates Title VII whenever it applies a facially discriminatory policy to one of its disfavored employees." Opp. at 13. Absent retroactive application of the PDA, respondents were not similarly situated to persons who took other types of pre-PDA disability leaves, and no amount of repetition can make respondents' *ipse dixit* claim of "facial discrimination" true.

Nor has AT&T conceded "that its NCS seniority system is a 'discriminatory polic[y].'" Opp. at 13 (alteration in original) (quoting Pet. at 18). AT&T acknowledged only that its *pre-PDA leave policies*

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[3] Respondents repeat the majority's manifestly erroneous claim that *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), did not establish the legality of AT&T's pre-PDA leave policies. Opp. at 10 n.3. They nowhere refute AT&T's showing, Pet. at 15 n.6, that *Gilbert* is the definitive statement of Title VII's meaning before the PDA, and that Congress could change Title VII's pre-PDA meaning only by giving the PDA retroactive effect—which it plainly did not do. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), did not overrule *Gilbert*. The policy at issue in *Satty* did not simply deny service credit to women on pregnancy leave (like the pre-PDA policies here and in *Gilbert*), but deprived women who took pregnancy leaves of service accrued before those leaves. *Satty*, 434 U.S. at 139. Even the Ninth Circuit recognized that, before the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men." *Pallas* v. *Pac. Bell*, 940 F.2d 1324, 1325 (9th Cir. 1991) (citing *Gilbert*). And while respondents cite EEOC regulations, Opp. at 10 n.3, the EEOC conceded below that "the denial of service credit to women on maternity leave was not unlawful" before the PDA. EEOC 9th Cir. Br. at 26.

"treated pre-PDA pregnancy leaves less favorably than other disability leaves," Pet. at 17. In the passage respondents quote, AT&T stressed that the NCS system itself, like the seniority system in *Evans*, was non-discriminatory, because it relied on dates created under policies that were legal at the time they were used and that in all events were no longer subject to challenge. Pet. at 18.

Alternatively, respondents claim that, even if the NCS system is facially neutral, their suit was timely under § 112 of the Civil Rights Act of 1991 (codified as § 706(e)(2)), which permits an employee to challenge a facially neutral seniority system adopted with an intentionally discriminatory intent whenever he or she is injured by the application of that system. Opp. at 13-15. The record lacks any evidence that AT&T adopted its NCS system with discriminatory intent, see ER R 58, and no such intent can be inferred to grant or sustain summary judgment against AT&T. Moreover, prior to 1991, the limitations period for challenging a "discriminatorily adopted" but facially neutral seniority system began to run "from the date the system was adopted," not from when its "effects" were "felt." *Lorance* v. *AT&T Techs., Inc.*, 490 U.S. 900, 906, 909, 912 n.5 (1989). Section 706(e)(2) changed that rule prospectively, but did not revive previously time-barred claims. *Chenault* v. *United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994); *FDIC* v. *Belli*, 981 F.2d 838, 842-43 (5th Cir. 1993). Thus, any "discriminatory adoption" claim was barred years before § 706(e)(2) was enacted and years before respondents filed this suit.

3. Finally, none of respondents' "prudential" reasons for denying the petition warrant ignoring a three-way circuit split and an en banc ruling that

flouts *Ledbetter* and *Evans*. Respondents argue the conflict will resolve itself because *Ledbetter* "refine[d] a major component of the controlling legal framework," the majority below took account of this new "guidance," and *Ledbetter* will prompt the Sixth and Seventh Circuits to see the errors of their ways. Opp. at 5-6, 15-16. Each premise is plainly wrong.

Far from refining the governing law, *Ledbetter* "appl[ied] *established precedent* in a slightly different context." 127 S. Ct. at 2165 (emphasis added). Canvassing its earlier opinions, the Court noted that "[i]t would be difficult to speak to the point more directly" than it had in *Evans*, *id.* at 2168, and that "[t]he instruction provided by *Evans*" and later cases "is clear." *Id.* at 2169. Nor did the majority below reassess its prior *Pallas* ruling in light of *Ledbetter*. See Pet. App. 10a n.5 (*Ledbetter* "is relevant, but does not control this appeal."). The primary "guidance" it gleaned from *Ledbetter* was that intentional discrimination within the charging period is actionable. *Id.* at 11a, 16a. That principle, however, is inapposite here, because the NCS system is not facially discriminatory and AT&T made no new decision to discriminate when determining pension benefits. The majority ignored the controlling import of *Evans*, as well as *Ledbetter*'s directly relevant observation that merely because "precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation." *Ledbetter*, 127 S. Ct. at 2174. Respondents do not and cannot refute AT&T's showing that, if the words "benefits award" were substituted for "pay" and "paycheck," the foregoing quotation describes this case precisely, and

compels the exact opposite ruling from the one reached below.

Ledbetter thus casts no doubt on *Leffman* v. *Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007), and *Ameritech Benefit Plan Comm.* v. *Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), both of which correctly anticipated its analysis. The Seventh Circuit deemed *Evans* the controlling authority where the relevant conduct is the computation of seniority and the alleged violation is "[t]he continuing impact of the earlier action, within the context of an otherwise neutral system." *Id.* at 822-23. The Sixth Circuit likewise relied on precedent citing *Evans* for the proposition that "claims of continuing effects of past discriminatory acts" do not state a current violation of Title VII. *Leffman*, 481 F.3d at 433.

Nor does pending legislation provide a basis for ignoring a square conflict and the misapplication of *Ledbetter* and *Evans*. Bills that, if enacted, could affect issues arising before the Court are frequently pending in Congress during litigation. This circumstance provides no basis for declining to review otherwise important issues of law dividing the lower courts. It is entirely uncertain that the Lily Ledbetter Fair Pay Act will ever be enacted into law, let alone in its current form. The Senate version has been stalled for months, and a presidential veto has been promised. See Statement of Administration Policy, H.R. 2831, Lily Ledbetter Fair Pay Act of 2007, at 1 (July 27, 2007). Review of a clear conflict on important legal issues should not be denied because a bill that might be enacted in a form that might affect a case is pending in the Congress.

Moreover, the fact that three circuits have weighed in on the issues presented (one circuit, twice) shows that these issues are recurring and important. No

"empirical evidence" supports respondents' claim that the questions raised by this case are unique to the telecommunications industry. The decisions in *Gilbert*, *Satty*, *Harriss* v. *Pan Am World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) and *Maki* v. *Allete, Inc.*, 383 F.3d 740 (8th Cir. 2004), demonstrate that employers in many industries denied full service credit for pre-PDA pregnancy leaves, and the latter two cases show that the effect of pre-PDA pregnancy policies on post-PDA pension awards has significance for employers other than telecommunications providers. Moreover, as previously shown, Pet. at 11-12, 22, the potentially thousands of women who lost service credit during pre-PDA pregnancy leaves are now retiring in significant numbers.

Finally, AT&T will plainly be prejudiced if review is denied. The damages phase of this case could take years, and during that time AT&T will have to make numerous benefit awards in administering a national seniority-based pension system. It is manifestly unfair to require AT&T to operate that system under directly conflicting legal requirements, particularly when the majority of circuits—and this Court's established precedents—clearly permit the conduct that the majority condemned below.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted.

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AMICUS CURIAE BRIEF

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(4)

No. 07-543

In the Supreme Court of the United States

AT&T CORPORATION, PETITIONER

v.

NOREEN HULTEEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an employer violates Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA), when it determines eligibility for pensions and other benefits without granting service credit that female employees did not receive when they took pre-PDA pregnancy leave.

2. Whether finding such a violation would give impermissible retroactive effect to the PDA.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). The statute also provides, in relevant part, that "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * *

provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(h).

In general, a Title VII plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). In states that have an administrative agency with authority to remedy practices prohibited by Title VII, a plaintiff who initially proceeds before that agency must file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred" or within 30 days of when the plaintiff receives notification that agency proceedings have been terminated, whichever is earlier. *Ibid.* California, where this action arose, has such an agency, 29 C.F.R. 1601.74, and the charges filed in this case are subject to a 300-day limitations period.

Title VII, as amended, also provides that

> an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of [Title VII] * * *, when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. 2000e-5(e)(2). In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court held that an employer's disability plan did not violate Title VII's prohibition against sex discrimination because it denied benefits for disabilities arising from pregnancy. The Court held "that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination." *Id.* at

136; *id.* at 138 (the insurance package "covers exactly the same categories of risk, and is facially nondiscriminatory").

In response to *Gilbert*, Congress enacted the Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076, which amended Title VII to provide that discrimination "because of sex" or "on the basis of sex" includes pregnancy-based conditions. 42 U.S.C. 2000e(k). The PDA became effective on October 31, 1978—the date of its enactment—except that its provisions explicitly did "not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act." § 2(b), 92 Stat. 2076.

2. As early as 1914, petitioner AT&T and its predecessor companies used a service crediting system that, for purposes of pension and other benefits, relied on an employee's continuous employment in company service. Joint Stip. ¶ 17. To calculate continuous employment, petitioner and its predecessors used a "Net Credited Service" (NCS) date that is an employee's initial date of hire adjusted forward in time to exclude periods for which no service credit accrued. *Id.* ¶ 18. An earlier NCS date puts an employee in a superior position for service-related determinations such as job bidding, vacation time, and retirement benefits. Pet. App. 4a.

Before August 7, 1977, petitioner and its relevant predecessor company, Pacific Telephone & Telegraph (PT&T), classified pregnancy as personal leave. An employee on personal leave received a maximum of 30 days' NCS credit, while there was no limit on the amount of NCS credit for employees on temporary disability leave. Joint Stip. ¶¶ 66-68. On August 7, 1977, PT&T extended the maximum NCS credit for pregnancy to 30 days before delivery and up to six weeks after delivery. *Id.* ¶¶ 70-71. On April 29, 1979,

the date the PDA became effective for fringe benefit and insurance programs, PT&T began to provide service credit for pregnancy leave on the same terms as for other temporary disability leave. PT&T made no adjustments, however, to the existing NCS dates of female employees who had taken pregnancy leave before April 29, 1979. *Id.* ¶ 79.

3. Respondents are past or present employees of petitioner who took pregnancy leaves before April 29, 1979, while employed by PT&T. Joint Stip. ¶¶ 1, 2, 25, 35-38, 48, 57. When respondents returned from pregnancy leaves, PT&T adjusted their NCS date forward to reflect that a portion of their leave was not entitled to service credit. Those adjustments were made before the PDA became effective. *Id.* ¶¶ 28, 37, 39, 50, 59. From 1994 to 2000, three of the individual respondents were involuntarily terminated or retired pursuant to a voluntary incentive/termination offer. *Id.* ¶¶ 33, 44, 45, 64. Their adjusted NCS dates were used to calculate pension and other benefits. *Id.* ¶¶ 34, 46, 64. The fourth individual respondent is a current employee. Pet. App. 5a.

None of the respondents filed a charge of discrimination with the EEOC within 300 days of their pregnancy leaves or of the effective date of the PDA. Joint Stip. ¶ 98. Instead, they filed charges with the EEOC between 1994 and 2002—more than 15 years after the PDA took effect—when they applied for pension benefits and their benefits were calculated using their NCS date. Pet. App. 6a; Joint Stip. ¶ 93 & n.4. Respondent Communications Workers of America, the collective bargaining representative for most of petitioner's non-management employees, also filed a charge during this period. Pet. App. 6a & n.2; Joint Stip. ¶ 95.

The EEOC found reasonable cause to believe that petitioner had discriminated against respondent Hulteen and a class of similarly situated female employees by refusing

to give them full service credit for pre-PDA pregnancy-related leaves and issued a right to sue notice. Pet. App. 6a; Joint Stip. ¶¶ 94, 96. Respondents then filed suit in district court, seeking relief on their own behalf and on behalf of other similarly situated employees. Pet. App. 100a; Joint Stip. ¶ 96. They alleged that the failure to credit them with time they were on disability leave due to pregnancy violated, *inter alia*, Title VII. Pet. App. 99a-100a.

4. The district court granted summary judgment in favor of respondents on the Title VII claim. Pet. App. 98a-128a. The court concluded (*id.* at 106a-123a) that the claim was controlled by *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), cert. denied, 502 U.S. 1050 (1992), which involved the same NCS system as implemented by one of petitioner's predecessor companies (Pacific Bell). *Pallas* held that Pacific Bell's failure to grant employees credit for pre-PDA pregnancy leaves when calculating retirement benefits after the PDA violated Title VII. *Id.* at 1326-1327.

The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b), and the Ninth Circuit granted petitioner permission to appeal. Pet. App. 69a.

5. A divided Ninth Circuit panel reversed. Pet. App. 64a-85a. The panel majority concluded that *Pallas* had been overcome by *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), which clarified that a statute has no retroactive application absent a clear expression of congressional intent. Pet. App. 71a, 83a. The panel majority concluded that it would give an impermissible retroactive effect to the PDA to hold that petitioner violated Title VII for not granting full credit for pre-PDA pregnancy leaves. *Id.* at 75a-76a. The court also held that respondents' claims were time-barred because they should have been brought when the initial accountings for pregnancy leaves were made before 1979 or at the latest when the PDA became effective in

1979. *Id.* at 81a-82a. Judge Rymer dissented; she agreed with the panel majority's analysis "on a fresh slate," but concluded that *Pallas* remained binding circuit law and dictated the opposite result. *Id.* at 86a-97a.

6. A divided en banc Ninth Circuit affirmed the district court's decision. Pet. App. 1a-63a. The majority looked to *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), and concluded that petitioner's seniority system was facially discriminatory, and therefore unlawful, "because it treat[s] similarly situated employees differently if the female employee took a pre-PDA pregnancy-related disability leave," Pet. App. 18a n.7; accord *id.* at 23a, and that petitioner intentionally discriminated on the basis of pregnancy each time petitioner used that system to calculate benefits. *Id.* at 10a-11a. The majority also pointed to 42 U.S.C. 2000e-5(e)(2), which provides that an unlawful employment practice occurs, *inter alia*, when a person is injured by application of an intentionally discriminatory seniority system. Pet. App. 19a-20a.

The majority acknowledged that the Sixth and Seventh Circuits had reached a contrary conclusion in considering a "nearly identical" Title VII challenge to similar NCS systems that, like the seniority system at issue in this case, "failed to credit time spent on pregnancy leave" before the PDA. Pet. App. 22a; see *id.* at 22a-27a & n.11 (discussing *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), cert. denied, 531 U.S. 1127 (2001), and *Leffman* v. *Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007)). But the majority disagreed with those decisions, reasoning that those courts incorrectly concluded that the NCS systems were not facially discriminatory and incorrectly relied on the exemption in 42 U.S.C. 2000e-2(h) for bona fide seniority systems. Pet. App. 23a-27a & n.11.

Four judges dissented. Pet. App. 29a-63a (O'Scannlain, J., dissenting). They concluded that the EEOC charges in this case were untimely under the line of cases beginning with *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), and culminating in *Ledbetter*. Pet. App. 37a-53a. In particular, the dissent concluded that petitioner's seniority system is facially neutral—and *non*discriminatory—unless the PDA is impermissibly given retroactive effect. *Id.* at 44a-47a. The dissent also concluded that the seniority system fell within the exemption in 42 U.S.C. 2000e-2(h) for bona fide seniority systems, and that 42 U.S.C. 2000e-5(e)(2) did not apply in this case because petitioner did not adopt its seniority system for an intentionally discriminatory purpose in violation of Title VII. Pet. App. 53a-63a.

DISCUSSION

The divided en banc Ninth Circuit held that an employer violates Title VII if it does not grant employees service credit for pregnancy-related leave taken *before* the PDA was enacted in calculating pension benefits decades *after* the PDA was enacted. That decision gives an impermissible retroactive effect to the PDA by imposing liability on employers for refusing to credit leave before the PDA was enacted. In addition, it directly contravenes this Court's precedents—in particular, *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977)—holding that Title VII is not violated every time an employment practice, including a seniority system, gives present effect to past discrimination. Indeed, the distinguishing feature of this case is that the alleged past "discrimination" (*i.e.*, not granting full credit for pregnancy leaves before the PDA) was not proscribed by Title VII when it occurred. The result in this case therefore follows a fortiori from *Evans* and the principles reaffirmed by this Court in *Ledbetter*, *supra*.

The Ninth Circuit's decision in this case perpetuates a square conflict in the circuits on the questions presented and demonstrates that the Court's recent *Ledbetter* decision will not prompt the courts of appeals to eliminate the conflict. The en banc majority expressly acknowledged that the Sixth and Seventh Circuits had reached the opposite result in entertaining "nearly identical" (Pet. App. 22a) challenges to essentially the same seniority system, and sharply disagreed with those decisions. *Id.* at 22a-27a & n.11. This Court's decision in *Ledbetter* only reinforces the result reached by the Sixth and Seventh Circuits. And although *Ledbetter* should have prompted the Ninth Circuit to reconsider its circuit precedent, both the majority and dissenting opinions drew support from that decision. Accordingly, the circuit conflict is here to stay.

An en banc decision, like the one below, which misconstrues this Court's decisions and perpetuates a direct circuit conflict, warrants this Court's review. And employees and employers alike would benefit from a uniform application of Title VII to the questions presented.

A. The Ninth Circuit's En Banc Decision Is Out of Step With This Court's Precedents

The court of appeals held that petitioner "violated Title VII by failing to credit pre-PDA pregnancy leave when it calculated benefits owed [to respondents]." Pet. App. 7a. That holding is incorrect because it gives an unintended retroactive effect to the PDA. In addition, even assuming that petitioner violated Title VII by failing to give pre-PDA pregnancy leave the same treatment as leave taken for temporary disabilities, such a violation occurred, at the latest,

on the effective date of the PDA, and respondents' claims are accordingly time-barred.[1]

1. The en banc Ninth Circuit held that, in calculating respondents' retirement benefits between 1994 and 2000, petitioner committed an unlawful employment practice under Title VII because the seniority system used to calculate those benefits does not treat pre-PDA pregnancy leave the same way as leave for temporary disabilities. Pet. App. 7a-28a. (As discussed above, petitioner treats post-PDA pregnancy leave the same as leave taken for temporary disabilities.) The court of appeals reasoned that petitioner's seniority system was facially "discriminatory," *id.* at 23a, 26a-27a, emphasizing that petitioner, in making such post-PDA benefit decisions, did not adjust respondents' service date by treating pre-PDA pregnancy leave the same as post-PDA pregnancy leave, *id.* at 19a, 20a-22a, 27a n.11. In a similar vein, respondents argue that calculating pension benefits in a manner that does not credit pre-PDA leave "perpetuates a facially discriminatory system which originated prior to the passage of the [PDA]." Compl. ¶ 88(a)-(d); see Br. in Opp. 8-13.

That analysis is seriously flawed. When petitioner adopted its pre-PDA leave policies and applied those policies to respondents' pregnancy leaves, the law did not dic-

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[1] The EEOC, both in its compliance manual and its amicus brief submitted to the Ninth Circuit panel in this case, has taken the position that an employer's failure to grant credit for pre-PDA pregnancy leave in the circumstances presented here violates Title VII. 2 EEOC Compl. Man. (BNA) tit. VII, § 3(b) at 627:0023 (Aug. 2001); EEOC Amicus C.A. Br. 6-26. For the reasons explained in this brief, that interpretation is based on a misreading of the relevant precedents of this Court, and therefore is not entitled to deference. *Ledbetter*, 126 S. Ct. at 2177 n.11. The EEOC has not made a recommendation to the Solicitor General on what position the United States should take in this case in this Court.

tate that pregnancy leave be treated the same as leave for other temporary disabilities. As discussed, *Gilbert*, *supra*, explicitly held that an employer's disability plan did not violate Title VII's prohibition against sex discrimination because it denied benefits for disabilities arising from pregnancy. The PDA overruled the result reached in *Gilbert*, but it did not do so retroactively. Indeed, the PDA not only did not apply retroactively, but it did not even apply prospectively to benefits programs "until 180 days after the enactment of th[e] Act." § 2(b), 92 Stat. 2076. When the PDA became effective for existing programs, it required employers going forward to treat pregnancy leaves on the same terms as other temporary disabilities.

The PDA did not create an obligation to grant employees credit for pre-PDA leave that Title VII did not require employers to grant before the passage of the PDA. That result would have required employers to adjust the service dates of female employees reaching back decades. Such an affirmative undertaking is far different from and far more burdensome than the PDA's basic injunction to refrain from discrimination on the basis of pregnancy. Congress could not have envisioned such a massive undertaking without acknowledgment. This Court's decision in *Landgraf*, *supra*, forbids such a retroactive effect without a clear textual directive. Yet the Ninth Circuit's decision in this case gives the PDA precisely the kind of retroactive effect forbidden by *Landgraf* by subjecting employers to liability for not crediting leave that was taken before the PDA.[2]

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[2] In a footnote (Br. in Opp. 10 & n.3) respondents suggest that petitioner's pre-PDA leave policies were unlawful. Respondents could have brought that claim when they were denied credit for pregnancy leave before the PDA was enacted. Ultimately, that claim would have been unsuccessful for the reasons that this Court gave in *Gilbert*. But, regardless of its merits, any claim that the pre-PDA policy was unlawful

2. a. The Ninth Circuit erred in believing that it could circumvent that result by simply holding that petitioner was required to credit pre-PDA pregnancy leaves whenever an employee benefit was calculated post-PDA on the basis of a NCS date predicated in part on pre-PDA leave policies. To be sure, the calculation of respondents' benefits had the effect of perpetuating petitioner's pre-PDA pregnancy-leave policies, and those policies were "discriminatory" insofar as they distinguished between leave taken for pregnancies and for other temporary disabilities—though before the PDA, that "discrimination" was not forbidden. That kind of perpetuation-of-past discrimination claim (even for discrimination that was unlawful when it occurred), however, is directly foreclosed by the *Evans-Ricks-Lorance-Ledbetter* line of precedents.

In *Evans*, a flight attendant was forced to resign her position based on an unlawful policy that prohibited female flight attendants from being married. 431 U.S. at 554-555. She was rehired by the same employer, but the employer used her rehiring date, rather than her original date of hire, to determine her seniority. *Id.* at 555. The employee brought suit alleging that the employer had violated Title VII "by refusing to credit her with seniority [based on her original date of hire]." *Id.* at 554. While acknowledging that the use of the employee's rehiring date to determine her seniority would perpetuate a past act of allegedly unlawful intentional discrimination, the Court rejected the employee's claim. *Id.* at 557-558. The Court explained that the critical inquiry under Title VII is not whether there are continuing consequences of a past act, but whether "any present *violation* exists." *Id.* at 558. The Court concluded

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accrued when respondents were denied credit, and accordingly expired decades ago.

that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of *a discriminatory act which occurred before the statute was passed.* It * * * is merely an unfortunate event in history which has no present legal consequences." *Ibid.* (emphasis added).

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the Court rejected a professor's claim that he could wait to challenge a decision to deny him tenure as intentionally discriminatory until after his employment contract expired, explaining that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Id.* at 258 (citation omitted). Likewise, in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), the Court—citing *Evans* and *Ricks*—held that female employees could not resurrect their untimely challenge to an intentionally discriminatory change in a seniority system by claiming that an unlawful employment practice occurred not only when the seniority system was changed, but also each time its concrete effects were felt. *Id.* at 906.[3]

Last term, in *Ledbetter*, the Court followed the reasoning of its earlier decisions and held that a Title VII disparate pay claim is untimely when the disparate pay, although received within Title VII's charge-filing limitations period, is the result of intentionally discriminatory pay decisions that occurred outside that period. 127 S. Ct. at 2167-2172. The Court again rejected the "present effect" argument, explaining that "[a] new violation does not occur, and a new

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[3] In response to *Lorance*, Congress enacted 42 U.S.C. 2000e-5(e)(2), discussed pp. 16-17, *infra*. While *Lorance*'s specific holding on when the adoption of an intentionally discriminatory seniority system must be challenged has been superseded by statute, the decision's analysis of Title VII's timeliness requirement remains authoritative for other purposes. *Ledbetter*, 127 S. Ct. at 2169 n.2.

charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 2169.

b. Those decisions—and in particular, *Evans*—dispose of respondents' Title VII claim. As noted, this case follows a fortiori from those decisions because the predicate act of discrimination here was not forbidden when it occurred. And even to the extent respondents believe (contrary to *Gilbert*) that petitioner violated Title VII when it denied full service credit for pre-PDA pregnancy leaves, that purported violation occurred when the credit was denied (or, if the violation is the failure to adjust service dates in light of the PDA, then upon passage of the PDA). Respondents could have, but did not, challenge the denial of such leave when it occurred—decades ago. Thus, under *Evans*, petitioner "was entitled to treat that past act as lawful after respondent[s] failed to file a charge of discrimination" within the 300-day charging period. *Evans*, 431 U.S. at 558.

Respondents attempt to distinguish *Evans* on the grounds that the seniority system in this case is "facially discriminatory," and that an employer who adopts a *facially* discriminatory seniority or pay policy can be regarded as engaging in intentional discrimination each time the policy is applied. See Br. in Opp. 8-13. But petitioner's seniority system is logically indistinguishable from the one in *Evans*, which this Court concluded was neutral and nondiscriminatory because it did not "treat[] former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a nondiscriminatory reason." 431 U.S. at 558; *id.* at 557. And in *Ledbetter* this Court reaffirmed *Evans* and explained that the fact that past discrimination "adversely affects the calculation of a *neutral* factor (like se-

niority) that is used in calculating [benefits]" does not render the benefits system discriminatory on its face, or mean that "each new [benefits decision] constitutes a new violation." 127 S. Ct. at 2174 (emphasis added).

Petitioner's seniority system is neutral and nondiscriminatory because the NCS date does not treat employees who used personal leave and were denied credit for a "discriminatory" reason any differently from employees who used personal leave and were denied credit for other reasons. Pet. App. 43a-45a (O'Scannlain, J., dissenting); *Leffman*, 481 F.3d at 433 (finding *Evans* controlling because employer does not treat "employees who have taken non-credited maternity leave differently from employees who have taken other kinds of non-credited leave"); *Ameritech*, 220 F.3d at 823 (finding *Evans* controlling because "simplistic as it may seem, [the] case involves computation of time in service—seniority by another name—followed by a neutral application of a benefit package to all employees with the same amount of time"). The only way in which petitioner's seniority system could be characterized as discriminatory is that the system "gives present effect to a past act of discrimination" (*Evans*, 431 U.S. at 558) insofar as it does not make an affirmative adjustment for pregnancy leaves taken before the PDA. But the same was true in *Evans*: the plaintiff there was forced to resign under the employer's discriminatory no-marriage policy and the employer's seniority system gave present effect to that discrimination by not "credit[ing] her with seniority for [her original hire period]." *Id.* at 554.

The only relevant difference between this case and *Evans* is that, here, the past "discrimination" (*i.e.*, not allowing full credit for pregnancy leave before the PDA) was not unlawful when it occurred, whereas the past discrimination in *Evans* (*i.e.*, forcing female employees who married to

resign) was unlawful when it occurred. See *Evans*, 431 U.S. at 554. A fortiori, petitioner's *lawful* pre-PDA discriminatory intent cannot be "shift[ed] * * * to a later act that was not performed with bias or discriminatory motive." *Ledbetter*, 126 S. Ct. at 2170.[4]

Respondents' reliance on *Bazemore* v. *Friday*, 478 U.S. 385 (1986) is inapposite. In that case, the Court held that the employer violated Title VII by continuing—after Title VII was enacted—to pay black employees less than white employees even though the pay disparities resulted from a pay structure that pre-dated Title VII. 478 U.S. at 395. The Court explained that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute." *Ibid.* As the Court empha-

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[4] This result squares with the intent of Title VII. As this Court held in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352-354 (1977), a seniority system does not lose its "bona fide" character under Section 703(h), 42 U.S.C. 2000e-2(h), because it perpetuates pre-Act discrimination. To the contrary, an "unmistakable purpose" of Congress in enacting Title VII was "to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII," even where the seniority system "perpetuate[d] the effects of pre-Act discrimination [between employees of different racial groups]." 431 U.S. at 352-353. The court of appeals dismissed (Pet. App. 23a-27a) the significance of Section 703(h) because a proviso in the PDA states that Section 703(h) cannot be interpreted to permit discrimination prohibited by the PDA. See 42 U.S.C. 2000e(k). But as discussed, petitioner has not violated the PDA, and the proviso in any event was not intended to remove Title VII's protection for bona fide seniority systems in cases involving pregnancy, but rather to foreclose the possibility, raised in *Gilbert*, that the last sentence of Section 703(h) would permit wage discrimination on the basis of pregnancy. See Pet. App. 57a-59a (O'Scannlain, J., dissenting).

sized in *Ledbetter*, "the focus in *Bazemore* was on a current violation [*i.e.*, the continuation of a discriminatory pay structure], not the carrying forward of a past act of discrimination." 127 S. Ct. at 2173 n.5.

This case is the antithesis of *Bazemore*. This case does not involve the "mere continuation" (*Bazemore*, 478 U.S. at 397 n.6) of discriminatory practices after the PDA was enacted. To the contrary, as of the effective date of the PDA, petitioner changed its policy to *eliminate* its prior pregnancy leave policy and provide service credit for all prospective pregnancy leaves on the same basis as leave taken for other temporary disabilities. Joint Stip. ¶ 79. Unlike the plaintiffs in *Bazemore* (see 478 U.S. at 396-397 n.6), respondents here are seeking to impose liability retroactively on the employer for its policies before the pertinent statute was passed, and not for a present violation stemming from a *continuation* of such policies.

Nor can respondents escape the clear import of this Court's precedents simply by saying that they are challenging the denial of pension benefits as those benefits become due (because those benefits are calculated without granting credit for pre-PDA pregnancy leave), rather than the denial of pre-PDA leave. Br. in Opp. 11. This Court repeatedly has rejected attempts to shift an earlier discriminatory intent onto a later non-discriminatory act that merely perpetuates and gives present effect to the earlier intent. See *Ledbetter*, 126 S. Ct. at 2169-2172 (employee argued she was challenging her pay check, not an earlier discriminatory pay decision); *Ricks*, 449 U.S. at 257 (employee argued he was challenging the termination of his contract, rather than the earlier discriminatory denial of tenure); *Evans*, 431 U.S. at 558 (employee argued she was challenging her seniority instead of her earlier forced resignation). Moreover, *Lorance* makes clear that the adoption of a discrimi-

natory policy for accruing seniority constitutes a "concrete harm" even though at the time of adoption the effects of the policy are "by their nature speculative." 490 U.S. at 907 n.9.

3. Both the Ninth Circuit (Pet. App. 19a-20a) and respondents (Br. in Opp. 14-15) rely on 42 U.S.C. 2000e-5(e)(2), quoted on p. 2, *supra*, in arguing that respondents were free to challenge their benefit calculations when they were made between 1994 and 2000. That reliance is misplaced. Section 2000e-5(e)(2) was enacted by Congress in 1991 in response to this Court's decision in *Lorance* and, as this Court recognized in *Ledbetter*, the provision was designed "to cover the specific situation involved in that case," 127 S. Ct. at 2169 n.2, *i.e.*, the adoption of a seniority system "for an intentionally discriminatory purpose in violation of [Title VII]." 42 U.S.C. 2000e-5(e)(2); *Lorance*, 490 U.S. at 903. The provision accordingly has no application here.

Petitioner did not adopt or alter its seniority system "for an intentionally discriminatory purpose in violation of [Title VII]." 42 U.S.C. 2000e-5(e)(2). To the contrary, when petitioner adopted its pre-PDA pregnancy leave policy, that policy was lawful under Title VII (see *Gilbert*, *supra*), and when Congress enacted the PDA petitioner *eliminated* its prior leave policy and adopted a policy that credits pregnancy leaves on the same terms as leaves for other temporary disabilities. Unless the PDA is to be given retroactive effect, petitioner's failure to adjust service dates to credit pre-PDA pregnancy leaves retroactively did not intentionally violate the PDA, either on the effective date of the PDA or thereafter as petitioner calculated benefits based on NCS dates based in part on pre-PDA leaves. Pet. App. 56a (O'Scannlain, J., dissenting).

B. The Ninth Circuit's En Banc Decision Perpetuates An Acknowledged Circuit Conflict And Warrants Plenary Review

a. The Ninth Circuit's en banc decision squarely conflicts with the decisions of two other courts of appeals. As the en banc majority explicitly acknowledged, both the Sixth and Seventh Circuits have rejected "nearly identical" challenges to seniority systems that are essentially the same as the one at issue in this case. Pet. App. 22a. The Ninth Circuit flatly disagreed with those decisions and recognized the "inter-circuit conflict over this issue." *Id.* at 22a n.8; see *id.* at 22a-27a & n.11.

In *Ameritech*, the Seventh Circuit addressed the same NCS system used by petitioner and unanimously held that employees' claims relating to the effect of their pre-PDA pregnancy leaves on their NCS date and current benefits were untimely. 220 F.3d at 823. The Sixth Circuit unanimously reached the same conclusion with regard to an analogous seniority system in *Leffman*, 481 F.3d at 433. The Sixth and Seventh Circuits reached their decisions in *Ameritech* (2000) and *Leffman* (2006) in the wake of the Ninth Circuit's decision in *Pallas* (1991) and the Ninth Circuit below reached its decision in the wake of *Ameritech* and *Leffman*. The circuit conflict thus is clear.[5]

Respondents argue that the conflict does not warrant this Court's review because *Ledbetter* "refines a major component of the controlling legal framework and thus invites lower courts to reassess their positions." Br. in Opp. 5-6.

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[5] The en banc majority observed that "the Eighth Circuit has rejected an analysis similar to that found in *Ameritech*," Pet. App. 22a n.8 (*Maki* v. *Allete, Inc.*, 383 F.3d 740 (2004)), suggesting that the circuit conflict is even deeper. While the employment practice at issue in *Maki* (*i.e.*, the "bridging" of a pension plan) differs from the practice at issue here and in *Ameritech* and *Leffman*, *Maki* illustrates that the questions presented can arise in other contexts.

As discussed above, however, *Ledbetter* reaffirmed and reinforced the principles articulated in *Evans* and *Ricks*, on which the Sixth and Seventh Circuits relied in reaching their decisions. *Leffman*, 481 F.3d at 431-433; *Ameritech*, 220 F.3d at 822-823. Given that *Ledbetter* reinforces their decisions, there is no reason for the Sixth or Seventh Circuit to reconsider their decisions in the wake of *Ledbetter*. Likewise, there is no reason to believe that the Ninth Circuit will correct its decision in this case after having issued this decision en banc and with the benefit of *Ledbetter*.

b. The proper application of Title VII to employment practices that give present effect to alleged past discrimination is important and, indeed, already is the subject of several decisions by this Court. The decision in this case presumably will have diminishing prospective application, given that the class of employees affected by pre-PDA pregnancy policies necessarily will dwindle over time. However, while the number of employees or employers affected by the decision in this case is unclear, the issue has reached three circuits in the last eight years in cases involving seniority systems that are essentially identical to the one here, and a fourth circuit in a case involving similar issues. See note 5, *supra*. Employees and employers alike would benefit from a uniform application of Title VII to such employment practices. There is no more reason to permit an erroneous construction of Title VII to subject employers to retroactive obligations in the Ninth Circuit that employers do not bear in other circuits than there would be to permit an erroneous construction of Title VII to deny benefits to employees in the Sixth or Seventh Circuits that are enjoyed by employees in the Ninth Circuit.

Moreover, because the en banc Ninth Circuit seriously misread this Court's *Evans-Ricks-Lorance-Ledbetter* line of cases, its en banc decision in this case could spawn confu-

sion concerning the extent to which employees may bring otherwise time-barred claims on the theory that an employer's perpetuation of alleged past discrimination gives rise to a new violation of Title VII. In that regard, it is significant that the Ninth Circuit issued its decision in the wake of *Ledbetter*, which reaffirmed the applicability of the same principles that the Ninth Circuit misapplied here. The Ninth Circuit's misreading of *Ledbetter* in this case could contribute to the erroneous application of the basic principles reaffirmed in *Ledbetter* in the variety of contexts in which those principles have been applied. Accordingly, the issue that has divided the circuits and split the Ninth Circuit en banc in this case appears to be of sufficient continuing importance to warrant this Court's review.

In these circumstances, neither the interlocutory posture of the case nor the proposed legislation cited by respondents provides a sufficient basis for denying certiorari. The court of appeals' decision in this case finally resolves "a controlling question of law" (28 U.S.C. 1292(b)), *i.e.*, whether "plaintiffs have established that they are entitled to judgment as a matter of law on their allegations of a violation of Title VII." Pet. App. 128a. The class certification and remedial issues that remain for remand under the Ninth Circuit's decision would in no way refine the questions presented for this Court's resolution, or alter the circuit's liability determination. Likewise, the proposed legislation failed to pass during the current session of Congress and is the subject of a presidential veto threat; the possibility that it will be enacted into law at some point in the future provides no reason to deny certiorari here. That is particularly true because it is not clear that the proposed

legislation would govern where, as here, the alleged discrimination was not unlawful when it occurred.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2008

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[6] The proposed bill (H.R. 2831) would amend 42 U.S.C. 2000e-5(a) to provide that an unlawful employment practice occurs, *inter alia*, "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits or other compensation is paid." 110th Cong., 1st Sess. § 3 (2007).

JOINT APPENDIX

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(7)

No. 07-543

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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September 8, 2008

PETITION FOR CERTIORARI FILED OCTOBER 22, 2007
CERTIORAI GRANTED JUNE 23, 2008

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 07-543 Petition For A Writ Of Certiorari at the following pages:

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UNITED STATES DISTRICT COURT
CALIFORNIA NORTHERN DISTRICT

No. 3:01-cv-01122-MJJ

NOREEN HULTEEN, *et al.*,
Plaintiffs,

v.

AT&T MANAGMENT PENSION PLAN, *et al.*,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/19/2000	54	NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF POINTS AND AUTHORITIES before Judge Martin J. Jenkins by defendant for summary judgment, and/or for judgment on the pleadings with Notice set for 2/25/03 at 9:30 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)
03/20/2001	1	COMPLAINT Summons(es) issued; Fee status pd entered on 3/20/01 in the amount of $150 (Receipt No. 4403272); jury demand [3:01-cv-01122] (rayp, COURT STAFF) (Entered: 03/28/2001)

DATE	NO.	PROCEEDINGS
03/20/2001	2	ORDER RE COURT PROCEDURE and SCHEDULE (ADR Multi-Option) by Mag. Judge Elizabeth D. Laporte : counsels' case management statement to be filed by 7/17/01 ; initial case management conference will be held 10:30 7/24/01. (cc: all counsel) [3:01-cv-01122] (rayp, COURT STAFF) (Entered: 03/28/2001)
03/20/2001		SUMMONS issued as to defendant AT&T Mgmt Pension Pl, defendant AT&T Corp., defendant AT&T Pension Plan, defendant AT&T Employees [3:01-cv-01122] (rayp, COURT STAFF) (Entered: 03/28/2001)
05/03/2001	3	WAIVER OF SERVICE by defendant served on 4/18/01 in response to the Request for Waiver sent on 4.12.01 [3:01-cv-01122] (rayp, COURT STAFF) (Entered: 05/11/2001)
05/31/2001	4	NOTICE by counsel for Noreen Hulteen, Eleanora Collet, Arma Horton, Elizabeth Snyder of change of address [3:01-cv-01122] (rayp, COURT STAFF) (Entered: 06/01/2001)
06/01/2001	6	DECLINATION to proceed before magistrate by defendant AT&T Mgmt Pension Pl, defendant AT&T Corp., defendant AT&T Pension Plan, defendant AT&T Employees [3:01-cv-01122] (scu, COURT STAFF) Modified on 07/06/2001 (Entered: 06/15/2001)

DATE	NO.	PROCEEDINGS
06/05/2001	7	MOTION before Mag. Judge Elizabeth D. Laporte by defendant AT&T Mgmt Pension Pl, defendant AT&T Corp., defendant AT&T Pension Plan, defendant AT&T Employees for attorney to appear pro hac vice . Fee status paid. [3:01-cv-01122] (scu, COURT STAFF) Modified on 07/06/2001 (Entered: 06/15/2001)
06/05/2001	8	MOTION before Mag. Judge Elizabeth D. Laporte by defendant AT&T Mgmt Pension Pl, defendant AT&T Corp., defendant AT&T Pension Plan, defendant AT&T Employees for attorney to appear pro hac vice . Fee status paid. [3:01-cv-01122] (scu, COURT STAFF) Modified on 07/06/2001 (Entered: 06/15/2001)
06/05/2001		RECEIVED Proposed Order (defendant AT&T Mgmt Pension Pl, defendant AT&T Corp., defendant AT&T Pension Plan, defendant AT&T Employees) re: motion for attorney to appear pro hac vice . Fee status paid. [9-1], re: motion for attorney to appear pro hac vice . Fee status paid. [8-1] [3:01-cv-01122] (scu, COURT STAFF) (Entered: 06/15/2001)
06/05/2001	9	CLERK'S NOTICE of impending reassignment to a United States District Judge [3:01-cv-01122] (scu, COURT STAFF) Modified on 07/06/2001 (Entered: 06/15/2001)

DATE	NO.	PROCEEDINGS
06/07/2001	5	ORDER by Executive Committee Case reassigned to Judge Martin J. Jenkins (Date Entered: 06/12/01) (cc: all counsel) [3:01-cv-01122] (be, COURT STAFF) (Entered: 06/12/2001)
06/07/2001	10	PROOF OF SERVICE by defendant of Magistrate order [6-1] [3:01-cv-01122] (kpc, COURT STAFF) Modified on 07/06/2001 (Entered: 06/18/2001)
06/07/2001		Docket Modification (Administrative) REFERRING to Judge Martin J. Jenkins the applications for attorneys to appear pro hac vice (Fee status paid) [9-1] [8-1]. [3:01-cv-01122] (lmh, COURT STAFF) (Entered: 06/25/2001)
06/11/2001	11	ANSWER by defendants to complaint [1-1] [3:01-cv-01122] (slh, COURT STAFF) Modified on 07/06/2001 (Entered: 06/18/2001)
06/13/2001	12	CLERK'S NOTICE: Case Management Conference set for 2:00 8/7/01 ; joint case management statement due 10 days prior to conference. [3:01-cv-01122] (slh, COURT STAFF) Modified on 07/06/2001 (Entered: 06/15/2001)
06/22/2001	13	ORDER by Judge Martin J. Jenkins granting defendants' motion for attorney Charles C. Jackson to appear pro hac vice [8-1] (cc: all counsel) [3:01-cv-01122] (tn, COURT STAFF)

DATE	NO.	PROCEEDINGS
		Modified on 07/06/2001 (Entered: 06/28/2001)
06/22/2001	14	ORDER by Judge Martin J. Jenkins granting defendants' motion for attorney Allegra R. Rich to appear pro hac vice [7-1] (cc: all counsel) [3:01-cv-01122] (tn, COURT STAFF) Modified on 07/06/2001 (Entered: 06/28/2001)
06/25/2001	15	LETTER dated 6/22/01 from plaintiff's counsel Judith E. Kurtz clarifying her change of address. [3:01-cv-01122] (slh, COURT STAFF) Modified on 07/06/2001 (Entered: 07/06/2001)
07/03/2001	16	NOTICE of need for ADR Phone Conference (L.R. 3-5) filed by parties. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 07/10/2001)
07/24/2001		Telephone conference with ADR director :MRA [3:01-cv-01122] (mra, COURT STAFF) (Entered: 07/24/2001)
07/27/2001	17	JOINT CASE MANAGEMENT STATEMENT and PROPOSED ORDER filed. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/01/2001)
08/16/2001	18	MINUTES: (C/R not reported) Initial case management conference held 8/7/01; Further case management conference set for 2:00 2/5/02 ; updated CMC statement due 1 week prior to conference. [3:01-cv-01122]

DATE	NO.	PROCEEDINGS
		(slh, COURT STAFF) (Entered: 08/20/2001)
09/26/2001	19	PROOF OF SERVICE by defendant of ADR notice [16-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/28/2001)
01/25/2002	20	JOINT CASE MANAGEMENT STATEMENT [3:01-cv-01122] (slh, COURT STAFF) (Entered: 01/29/2002)
02/01/2002	21	REQUEST by Plaintiff Communications Wrkrs to participate by telephone in the case management conference. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 02/04/2002)
02/01/2002	22	REQUEST by defendant for leave to participate in subsequent case management conference by telephone. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 02/04/2002)
02/05/2002	23	CLERK'S NOTICE: Case Management Conference set for 1:45 5/7/02; joint case management statement due 10 days prior to conference. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 02/06/2002)
04/26/2002	24	JOINT CASE MANAGEMENT STATEMENT [3:01-cv-01122] (slh, COURT STAFF) (Entered: 04/29/2002)

DATE	NO.	PROCEEDINGS
05/08/2002	25	MINUTES: (C/R not reported) (Hearing Date: 5/7/02) Case management conference held; discovery is ongoing; Further status conference set for 2:00 8/6/02 to check on the status of the Joint Stipulated Facts. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 05/09/2002)
05/14/2002	26	NOTICE OF MOTION AND MOTION before Judge Martin J. Jenkins by Plaintiff for Rule 23(d) Order with Notice set for 6/18/02 at 9:30 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 05/16/2002)
05/14/2002	27	MEMORANDUM OF POINTS AND AUTHORITIES by Plaintiff in support of motion for Rule 23(d) Order [26-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 05/16/2002)
05/14/2002	28	DECLARATION by Jean Thomas on behalf of Plaintiff in support of motion for Rule 23(d) Order [26-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 05/16/2002)
05/14/2002	29	DECLARATION by Judith E. Kurtz on behalf of Plaintiff in support of motion for Rule 23(d) Order [26-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 05/16/2002)

DATE	NO.	PROCEEDINGS
05/28/2002	30	OPPOSITION by defendants to plaintiff's motion for Rule 23(d) Order [26-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 05/29/2002)
06/04/2002	31	REPLY BRIEF by Plaintiff in support of motion for Rule 23(d) Order [26-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 06/05/2002)
06/04/2002	32	SECOND DECLARATION by Judith E. Kurtz on behalf of Plaintiff in support of motion for Rule 23(d) Order [26-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 06/05/2002)
06/07/2002	33	JOINT STATUS REPORT [3:01-cv-01122] (slh, COURT STAFF) (Entered: 06/10/2002)
06/18/2002	34	MINUTES: (C/R Kathy Wyatt) (Hearing Date: 6/18/02) denying without prejudice plaintiff's motion for Rule 23(d) Order [26-1]; Status Conference set for 2:00 7/2/02 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 06/19/2002)
06/26/2002	35	REPORTER'S TRANSCRIPT; Date of proceedings: 6/18/02 (C/R: Kathy Wyatt) minutes [34-2] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 06/28/2002)
06/27/2002	36	PARTIES' STIPULATION as to protective order [3:01-cv-01122] (slh, COURT STAFF) (Entered: 06/28/2002)

DATE	NO.	PROCEEDINGS
07/02/2002	37	MINUTES: (C/R not reported) (Hearing Date: 7/2/02) Staus conference held; Court orally approves the propsoed protective order and will sign; further status conference will be held 2:30 7/12/02 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 07/10/2002)
07/03/2002	38	PROTECTIVE ORDER by Judge Martin J. Jenkins (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 07/12/2002)
07/12/2002	39	MINUTES: (C/R not reported) (Hearing Date: 7/12/02) Status conference held; parties are to meet and confer to discuss any further changes to the notice; present hearing date for status conference remains 8/6/02 at 2:00 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 07/16/2002)
07/26/2002	40	JOINT CASE MANAGEMENT STATEMENT [3:01-cv-01122] (slh, COURT STAFF) (Entered: 07/29/2002)
08/06/2002	41	MINUTES: (C/R not reported) (Hearing Date: 8/6/02) Status conference held; Status conference set for 2:00 10/1/02 ; case continued to 1/21/03 for motion for summary judgment re; relationship of entities; letter to Court re: the Fiduciary issue due by parties 8/30/02. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/14/2002)

DATE	NO.	PROCEEDINGS
09/24/2002	42	JOINT CASE MANAGEMENT STATEMENT and PROPOSED ORDER filed. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/26/2002)
09/26/2002	43	STIPULATION and ORDER by Judge Martin J. Jenkins for leave to file a First Amended Complaint substituting Linda Porter as a named plaintiff in the place of Arma Horton; dismissing plaintiff Arma Horton without prejudice to her rights to recover any damages to which she might be entitled upon resolution of this lawsuit (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/27/2002)
10/01/2002	44	PLAINTIFFS' SUPPLEMENTAL CASE MANAGEMENT STATEMENT filed. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 10/02/2002)
10/02/2002	45	MINUTES: (C/R Diane Skillman) (Hearing Date: 10/1/02) Status conference held; Further status conference set for 3:30 2/25/03 ; opening briefs deadline 11/14/02; oppositions due 12/18/02; replys due 1/24/03. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 10/08/2002)
10/08/2002	46	ANSWER by defendant to first amended complaint [3:01-cv-01122] (slh, COURT STAFF) (Entered: 10/11/2002)

DATE	NO.	PROCEEDINGS
10/21/2002	47	CLERK'S NOTICE that the motion for summary judgment is reset for 2/4/03 at 9:30. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 10/24/2002)
10/28/2002	48	AMENDED CLERK'S NOTICE that the motion for summary judgment is reset for 2/25/03 at 9:30. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 10/29/2002)
10/28/2002		Docket Modification (Administrative) to clerk notice [48-1] motion hearing set for 9:30 2/25/03 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 10/29/2002)
10/31/2002	49	PROOF OF SERVICE by Plaintiff of stipulation and order [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/01/2002)
11/12/2002	50	ORDER by Judge Martin J. Jenkins for production of documents ; see Order for specifics. (Date Entered: 11/13/02) (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/13/2002)
11/13/2002	51	DECLARATION by Judith E. Kurtz in support of Stipulation and Order to enlarge time and exceed page limitation. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/15/2002)

DATE	NO.	PROCEEDINGS
11/13/2002	52	ORDER by Judge Martin J. Jenkins GRANTING the request to enlarge time to 11/19/02 to file opening briefs; DENYING the request to exceed the page limitation. (Date Entered: 11/15/02) (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/15/2002)
11/19/2002	53	NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF POINTS AND AUTHORITIES before Judge Martin J. Jenkins by Plaintiffs for summary judgment with Notice set for 2/25/03 at [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)
11/19/2002	55	DECLARATION by Charles C. Jackson on behalf of defendants in support of motion for summary judgment [54-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)
11/19/2002	56	DECLARATION by Brian M. Byrnes on behalf of defendants in support of motion for summary judgment [54-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)
11/19/2002	57	APPENDIX of unpublished cases filed by defendants in support of motion for summary judgment [54-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)

DATE	NO.	PROCEEDINGS
11/19/2002	58	PARTIES' JOINT STIPULATION of fact in support of their respective motions for summary judgment [53-1], [54-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)
11/19/2002	59	JOINT APPENDIX of evidentiary materials filed by parties in support of motions for summary judgment [53-1], [54-1] (Volume I) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)
11/19/2002	60	JOINT APPENDIX of evidentiary materials filed by parties in support of motions for summary judgment [53-1], [54-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)
11/19/2002	61	JOINT APPENDIX of evidentiary marterials filed by parties in support of motions for summary judgment [53-1], [54-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 11/20/2002)
11/20/2002	62	NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF POINTS AND AUTHORITIES before Judge Martin J. Jenkins by defendant for summary judgment and/or for judgment on the pleadings with Notice set for 2/25/03 9:30 a.m. [3:01-cv-01122] (gba, COURT STAFF) (Entered: 11/21/2002)

DATE	NO.	PROCEEDINGS
11/20/2002	63	PROOF OF SERVICE by defendant of motion for summary judgment [62-1], motion for judgment on the pleadings [62-2] [3:01-cv-01122] (gba, COURT STAFF) (Entered: 11/21/2002)
12/18/2002	64	MEMORANDUM OF LAW by defendant in opposition to plaintiff's motion for summary judgment [53-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/19/2002)
12/18/2002	65	DECLARATION by Charles C. Jackson on behalf of defendant in opposition to motion for summary judgment [53-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/19/2002)
12/18/2002	66	OPPOSITION by Plaintiff to defendant's motion for summary judgment [62-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/19/2002)
12/18/2002	67	DECLARATION by Judith E. Kurtz on behalf of Plaintiff in opposition to motion for summary judgment [62-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/19/2002)
12/18/2002	68	DECLARATION by Patrick M. Scanlon on behalf of Plaintiff in opposition to motion for summary judgment [62-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/19/2002)

DATE	NO.	PROCEEDINGS
12/18/2002	69	APPENDIX of Congressional Materials filed by Plaintiff in support of opposition to defendant's motion for summary judgment [62-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/19/2002)
12/18/2002	70	OBJECTIONS by Plaintiff to evidence [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/19/2002)
12/18/2002	71	PROOF OF SERVICE by Plaintiff of opposition [66-1], declaration [67-1], declaration [68-1], documents [69-1], objection [70-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/19/2002)
01/07/2003	72	NOTICE by Plaintiff of change of firm name [3:01-cv-01122] (slh, COURT STAFF) (Entered: 01/08/2003)
01/24/2003	73	REPLY by Plaintiffs to defendant's opposition to motion for summary judgment [53-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 01/29/2003)
01/24/2003	74	SUPPLEMENTAL JOINT APPENDIX of evidentiary materials filed by Plaintiff in support of motion for summary judgment [53-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 01/29/2003)

DATE	NO.	PROCEEDINGS
01/24/2003	75	DECLARATION by Mary Ann Ranz on behalf of Plaintiff re motion for summary judgment [53-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 01/29/2003)
01/24/2003	76	REPLY MEMORANDUM by defendant in support of motion for summary judgment [62-1], and/or motion for judgment on the pleadings [62-2] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 01/29/2003)
01/24/2003	77	APPENDIX of Non-Federal Authorities cited in reply brief filed by defendant [3:01-cv-01122] (slh, COURT STAFF) (Entered: 01/29/2003)
01/27/2003	78	REPLY by Plaintiff to defendants' opposition to motion for summary judgment [53-1] [corrected] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 01/30/2003)
02/03/2003	79	OPPOSITION by defendant to plaintiff's objections to evidence [70-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 02/06/2003)
02/13/2003	80	CLERK'S NOTICE resetting hearing on motion for summary judgment [62-1], motion for summary judgment [53-1] 9:30 3/18/03 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 02/21/2003)

DATE	NO.	PROCEEDINGS
02/27/2003	81	DECLARATION by Mary K. O'Melveny in support of stipulation and order to reschedule hearing date on cross-motions for summary judgment [53-1],[62-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 03/03/2003)
02/28/2003	82	STIPULATION and ORDER by Judge Martin J. Jenkins: resetting hearing on cross-motions for summary judgment [53-1] [62-1] 9:30 4/8/03 (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 03/03/2003)
03/18/2003	83	DECLARATION by Allegra R. Rich on behalf of defendant in support of the parties' stipulation and order to modify FMP Release Addendum [3:01-cv-01122] (slh, COURT STAFF) (Entered: 03/25/2003)
03/24/2003	84	STIPULATION and ORDER by Judge Martin J. Jenkins : to modify FMP Release Addendum ; Addendum attached to stipulation (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 03/27/2003)
04/08/2003	85	PROOF OF SERVICE by Plaintiff of stipulation and order to modify FMP Release Addendum [84-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 04/08/2003)

DATE	NO.	PROCEEDINGS
04/08/2003	86	MINUTES: (C/R Kathy Wyatt) (Hearing Date: 4/8/03) that defendant's motion for summary judgment [62-1] and/or motion for judgment on the pleadings [62-2] is submitted; that plaintiffs motion for summary judgment [53-1] is submitted; Court to issue Order [3:01-cv-01122] (slh, COURT STAFF) (Entered: 04/09/2003)
07/07/2003	87	REPORTER'S TRANSCRIPT; Date of proceedings: 4/8/03 (C/R: Katherine Wyatt) minutes [86-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 07/10/2003)
08/07/2003	88	ORDER by Judge Martin J. Jenkins GRANTIN IN PART AND DENYING IN PART plaintiffs motion for summary judgment [53-1]; GRANTING IN PART AND DENYING IN PART defendant's motion for summary judgment [62-1] (Date Entered: 8/8/03) (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/08/2003)
08/07/2003	89	CLERK'S NOTICE: Status conference set for 2:00 8/19/03 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/08/2003)

DATE	NO.	PROCEEDINGS
08/11/2003	90	AMENDED ORDER by Judge Martin J. Jenkins GRANTING IN PART AND DENYING IN PART plaintiff's motion for summary judgment [53-1]; GRANTING IN PART AND DENYING IN PART defendant's motion for summary judgment [62-1]; see Order for specifics. (Date Entered: 8/12/03) (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/12/2003)
08/15/2003	91	DECLARATION by Stephanie Bornstein in support of stipulation and order to reschedule status conference [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/18/2003)
08/18/2003	92	NOTICE by Plaintiffs of change of address [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/19/2003)
08/18/2003	93	STIPULATION and ORDER by Judge Martin J. Jenkins : Status conference reset for 2:00 9/30/03 (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/19/2003)
08/21/2003	94	NOTICE OF MOTION AND MOTION before Judge Martin J. Jenkins by defendant AT&T Corp. for the Court to amend its summary judgment order pursuant to 28 USC 1292(b) and FRAP 5(a)(3) with Notice set for 9/30/03 at 2:00 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/21/2003)

DATE	NO.	PROCEEDINGS
08/25/2003	95	PROOF OF SERVICE of stipulation and order [93-2] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/26/2003)
08/26/2003	96	AMENDED NOTICE of hearing by defendant setting motion for the Court to amend its summary judgment order pursuant to 28 USC 1292(b) and FRAP 5(a)(3) [94-1] ; hearing set for 9:30 9/30/03 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/27/2003)
08/26/2003	97	NOTICE by defendant of change of firm name [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/27/2003)
09/09/2003	98	OPPOSITION by Plaintiff to defendant's motion for the Court to amend its summary judgment order pursuant to 28 USC 1292(b) and FRAP 5(a)(3) [94-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/10/2003)
09/16/2003	99	REPLY by defendant AT&T Corp. in support of its motion for the Court to amend its summary judgment order pursuant to 28 USC 1292(b) and FRAP 5(a)(3) [94-1] [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/18/2003)
09/19/2003	100	JOINT CASE MANAGEMENT STATEMENT [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/22/2003)

DATE	NO.	PROCEEDINGS
09/24/2003	101	ORDER by Judge Martin J. Jenkins certifying amended order granting in part and denying in part motions for summary judgment for interlocutory appeal [90-1]; staying case pending interlocutory appeal (Date Entered: 9/26/03) (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/26/2003)
03/03/2004	102	NOTICE by defendant AT&T Corp. of change of address [3:01-cv-01122] (slh, COURT STAFF) (Entered: 03/05/2004)
03/12/2004		RECEIVED fee in amount of $ 255.00 (Receipt # 3357801) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 03/16/2004)
05/24/2004		Docket fee notification sent to USCA [3:01-cv-01122] (slh, COURT STAFF) (Entered: 05/24/2004)
05/28/2004		BRIEFING SCHEDULE from USCA [3:01-cv-01122] (slh, COURT STAFF) (Entered: 06/01/2004)
05/28/2004		NOTIFICATION by Circuit Court of Appellate Docket Number 04-16087 [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/06/2004)
07/02/2004	103	NOTICE by defendant AT&T Corp. that no additional transcripts will be ordered [3:01-cv-01122] (slh, COURT STAFF) (Entered: 07/06/2004)

DATE	NO.	PROCEEDINGS
12/06/2004		CERTIFICATE of Record mailed to USCA, counsel notified. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/06/2004)
12/10/2004	104	NOTICE OF APPEARANCE for Plaintiffs by Noreen Farrell [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/15/2004)
12/10/2004		Docket Modification (Administrative) re [104-1] withdrawing attorney Stephanie Bornestein for plaintiffs [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/15/2004)
12/13/2004	105	RECEIPT from USCA of Certificate of Record [3:01-cv-01122] (slh, COURT STAFF) (Entered: 12/15/2004)
05/13/2005	106	NOTICE by Plaintiffs of change of address [3:01-cv-01122] (slh, COURT STAFF) (Entered: 05/13/2005)
08/08/2005		RECORD on Appeal to USCA. [3:01-cv-01122] (slh, COURT STAFF) (Entered: 08/08/2005)
09/13/2005	107	ADMINISTRATIVE ORDER by Judge Martin J. Jenkins closing case for statistical purposes (Date Entered: 9/14/05) (cc: all counsel) [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/14/2005)
09/27/2005		Amended docket fee payment notification mailed to USCA [3:01-cv-01122] (slh, COURT STAFF) (Entered: 09/27/2005)

DATE	NO.	PROCEEDINGS
09/11/2007	108	USCA JUDGMENT affirming the decision of the District Court. (slh, COURT STAFF) (Filed on 9/11/2007) (Entered: 09/14/2007)
09/14/2007	109	CLERKS Letter Spreading Mandate to Counsel. (slh, COURT STAFF) (Filed on 9/14/2007) (Entered: 09/14/2007)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-16087

NOREEN HULTEEN, *et al.*,
Plaintiffs / Appellees,
v.
AT&T CORPORATION,
Defendant / Appellant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/27/2004	1	Filed order in 03-80107 (Ferdinand F. FERNANDEZ and William A. FLETCHER): The filing received on 10/24/03, is construed in part as a request for an extension of time to file an answer in opposition to the petition filed 10/14/03. So construed, the request is GRANTED. The clerk shall file the answer received 10/24/03. The opposed petition for permission to appeal pursuant to 28 U.S.C. 1292(b) is GRANTED. Respondent's request that any appeal resulting from this order encompass all other claims addressed by the district court's 08/11/03 order is DENIED. Within 10 days of this order, petitioner shall perfect the appeal pursuant to FRAP 5(d). [04-16087]

DATE	NO.	PROCEEDINGS
05/27/2004	2	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. Setting schedule as follows: appellant's designation of RT is due 3/8/04; appellee's designation of RT is due 3/18/04; appellant shall order transcript by 3/29/04; court reporter shall file transcript in DC by 4/28/04; certificate of record shall be filed by 5/5/04; appellant's opening brief is due 7/6/04; appellees' brief is due 8/5/04; appellants' reply brief is due 8/19/04; [04-16087]
05/27/2004	3	Rec'd notice of change of address from Charles C. Jackson for Appellant AT&T Corporation dated 04/23/04. (new address: Seyfarth Shaw, LLP, 55 East Monroe Street, Suite 4200, Chicago, ILL 60603-5803) (CASE-FILE) [04-16087]
05/27/2004	4	Filed Allegra R. Rich for Appellant AT&T Corporation Civil Appeals Docketing Statement served on 3/11/04 (to CONFATT) [04-16087] [04-16087]
05/27/2004	5	Received notification from District Court re payment of docket fee. (Date: 03/12/04) (CASEFILE) [04-16087]
06/10/2004	7	Filed motion and clerk order :(Deputy Clerk: tah) The aplt's mtn for a revised time schedule order is granted. On 6/14/04, the aplt shall serve the

DATE	NO.	PROCEEDINGS
		aples with a notice specifying which portions of the transcript the aplt intends to order from the court reporter. Alternatively, the aplt shall serve on aples a statement indicating that the aplt does not intend to order any transcripts. On 6/24/04, the aples may respond to the aplt's initial notice by serving on the aplt a list of any additional portions of the transcript that the aples deem necessary to the appeal. On 7/6/04, the aplt shall file in the district court (1) a notice that no transcripts are necessary or (2) the transcript order form. The a transcripts are due 8/5/04. The opn brief is due 9/14/04. The ans brief is due 10/14/04. The opt rpy brief is due 14 days after service of the ans brief. The aplt shall include the correct United States Court of Appeals case number, 04-16087, in the caption of all future filings. (Motion recvd 6/4/04) [04-16087]
06/29/2004	9	Filed order CONFATT (epm) This case is under consideration for inclusion in the Mediation Program. Within 14 days of the date of this order, csl for all parties intending to file briefs in this matter are requested to infomr Peter W. Sherwood, Circuit Mediator in writing. . . The existing briefing schedule remains in effect . . . [04-16087]

DATE	NO.	PROCEEDINGS
08/23/2004	11	Filed order CONFATT (PWS) The court has determined that this appeal will not be selected for inclusion the Mediation Program. The briefing schedule set forth in the court's order filed 6/10/04 shall remain in effect . . . [04-16087]
09/15/2004	12	Filed original and 15 copies Appellant AT&T Corporation opening brief (Informal: No) 51 pages and five excerpts of record ; served on 9/14/04 [04-16087]
10/06/2004	13	Filed Aples' motion to extend time to file appellee's brief served on 10/6/04 wip/PROMO.
10/14/2004	14	Filed Aplt's response to Aples' mtn for extension of time to file brief, served on 10/13/04 wip/PROMO. [04-16087]
10/22/2004	16	Filed order (Appellate Commissioner) The aples' mtn for an extension of time in which to file the ans brief is granted. The ans brief is due 12/14/04. The aplt'x x-mtn for an extension of time in which to file the opt rpy brief is granted. The opt rpy brief is due 1/12/05. Court records do not currently reflect that the district court has issued the certificate of record. The aplt shall monitor the issuance of the certificate. (PROMO) [04-16087]

DATE	NO.	PROCEEDINGS
12/07/2004	17	Filed certificate of record on appeal RT filed in DC 06/26/03, 07/07/03 [04-16087]
12/10/2004	18	Filed notice of appearance of Judith E. Kurtz, Noreen Farrell, Blythe Mickelson, Henry S. Hewitt, Mary K. O'Melveny for Aples. [04-16087]
12/15/2004	19	Filed original and 15 copies appellee Noreen Hulteen, Eleanora Collet's 58 pages brief ; served on 12/14/04 [04-16087]
01/05/2005	21	Filed original and 15 copies EEOC's amicus brief of 27 pages ; served on 12/23/04 [04-16087]
01/13/2005	23	Calendar check performed [04-16087]
01/13/2005	24	Filed original and 15 copies AT&T Corporation reply brief, (Informal: No) 30 pages; served on 1/12/05 [04-16087]
05/12/2005	25	Rec'd notice of change of address from Blythe Mickelson dated 5/11/05. (New address same as per record). [04-16087]
05/16/2005	28	Filed AT&T Corporation additional citations, served on 5/13/05 [04-16087]
07/25/2005	29	Calendar materials being prepared. [04-16087] [04-16087]
07/28/2005	30	CALENDARED: San Francisco October 17, 2005 9:00 am Courtroom 4 ** moved to Thur Oct 20 2005 ** [04-16087]

DATE	NO.	PROCEEDINGS
08/08/2005	32	FILED CERTIFIED RECORD ON APPEAL IN 3 CLERKS RECORD, AND FOLDERS OF BULKY DOCUMENTS. (PER CC-MAIL MEMO) [04-16087]
09/01/2005	33	Filed Appellant AT&T Corporation's motion to move oral argument date served on 9/1/05 PANEL. [04-16087]
09/06/2005	34	Filed order (Deputy Clerk: jf) Aplt's mtn to move oral argument date is granted. Oral argument will be heard on Thursday, Oct. 20, 2005 in San Francisco. (phoned csls) [04-16087]
10/06/2005	36	Filed Amicus EEOC's motion to appear and argue merits of the case. served on 10/5/05 PANEL.
10/07/2005	37	Filed order (Deputy Clerk: hh) the mtn of the EEOC as amicus seeking leave to argue on ceded time is granted. Their allowed time of 5 minutes will be decuted from the 20 min. allocated to plaintiff-appelles. (phoned csls) [04-16087]
10/20/2005	38	ARGUED AND SUBMITTED TO Stephen S. TROTT, Pamela A. RYMER, S. J. Plager [04-16087]
10/20/2005	39	Filed Paul Ramshaw, Esq. for EEOC additional citations, served PANEL in open court on 10/20/05 [04-16087]

DATE	NO.	PROCEEDINGS
03/08/2006	45	FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Stephen S. TROTT; Pamela A. RYMER, dissenting; S. J. Plager, author.) FILED AND ENTERED JUDGMENT. [04-16087]
03/22/2006	47	Filed original and 50 copies Appellee Noreen Hulteen, Appellee Eleanora Collet petition for panel rehearing and petition for rehearing en banc 18 p.pages, served on 3/22/06 [04-16087]
03/27/2006	49	Filed order (Stephen S. TROTT, Pamela A. RYMER, S. J. Plager,): Defendant/Appellant is directed to file a response (50 copies) to Plaintiffs-Appelle's petition for rehearing en banc filed 3/22/06. the response shall not exceed 15 pages and shall be filed within 21 days from the filed date of this order. (phoned csl) [04-16087]
04/17/2006	50	Filed Appellant AT&T Corporation's response to petition petition for enbanc rehearing served on 4/14/06 [04-16087]
07/19/2006	55	Filed order (for publication) (Mary M. SCHROEDER,): Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered thatthis case be reheard by the en banc pursuant to Circuit Rule 34-3.

DATE	NO.	PROCEEDINGS
		The three-judge panel shall not be cited as precedent by or to this court or any district court of the 9th Cir., except to the extent by the en banc court. [04-16087]
07/21/2006	58	Filed order (Mary M. SCHROEDER,): The parties shall forward to the Clerk of Court 30 copies of their original briefs and excerpts of record within 7 days from the date of this order. (phoned csls) [04-16087]
07/21/2006	59	Filed order (Mary M. SCHROEDER,): Oral argument in the above case shall be reheard en banc in San Francisco, CA on Wednesday 10/4/06 at 3:00 p.m. (PHONED CSLS) [04-16087]
07/24/2006	60	CALENDARED: SAN FRAN Oct 4 2006 300 pm Courtroom 1 ** moved to Ctrm 4 *** [04-16087]
07/27/2006	62	Received 30 copies of Appellees' brief filed 12/15/04 (to ENBANC PANEL on 7/28/06). [04-16087]
07/28/2006	63	Received 30 copies of Aplt's opn brief and Exc filed 9/15/04 and 30 copies of Aplt's rpy brief filed 1/13/05 (to ENBANC PANEL on 7/28/06). [04-16087]
08/02/2006	64	Filed Amicus EEOC's motion for leave to file its brief as Amicus Curiae Before the en banc Court served on 8/1/06 ENBANC PANEL with brief.

DATE	NO.	PROCEEDINGS
08/02/2006	65	Received 30 copies of Amicus Curiae brief from EEOC previously filed on 1/5/06. Fedex ENBANC panel together with EEOC mtn. [04-16087]
08/08/2006	66	Filed order (Mary M. SCHROEDER,): The EEOC's mtn for leave to file its brief as Amicus Curiae is granted. [04-16087]
09/21/2006	70	Filed EEOC's motion to appear and argue merits of the case. ; served on 9/20/06 (Chief Judge) [04-16087]
09/26/2006	71	Filed order (Mary M. SCHROEDER,): The EEOC's unopposed request to participate in oral argument on behalf of Plaintiffs-Appellees ceded by Plaintiffs is granted.(phoned csls) [04-16087]
10/04/2006	72	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Stephen R. REINHARDT, Diarmuid F. O'SCANNLAIN, Pamela A. RYMER, Michael D. HAWKINS, Susan P. GRABER, M. M. McKEOWN, Kim M. WARDLAW, William A. FLETCHER, Raymond C. FISHER, Ronald M. GOULD, Richard A. PAEZ, Marsha S. BERZON, Jay S. BYBEE and CONSUELO M. CALLAHAN. [04-16087]
04/13/2007	75	Filed AT&T Corporation additional citations, served on 4/12/07 ENBANC PANEL. [04-16087]

DATE	NO.	PROCEEDINGS
05/08/2007	77	Filed Hulteen'd additional citations, served on 5/1/07 ENBANC PANEL. [04-16087]
06/06/2007	80	Filed AT&T Corporation additional citations, served on 6/5/07 EN BANC PANEL. [04-16087]
06/13/2007	81	Filed Noreen Hulteen additional citations, served on 6/8/07 ENBANC PANEL. [04-16087]
08/17/2007	84	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Heard en banc; Mary M. SCHROEDER; Stephen R. REINHARDT; Diarmuid F. O'SCANNLAIN, dissenting; Pamela A. RYMER; Michael D. HAWKINS; Susan P. GRABER; M. M. McKEOWN; Kim M. WARDLAW, author; William A. FLETCHER; Raymond C. FISHER; Ronald M. GOULD; Richard A. PAEZ; Marsha S. BERZON; Jay S. BYBEE; CONSUELO M. CALLAHAN.) FILED AND ENTERED JUDGMENT. [04-16087]
08/30/2007	85	Filed Appellee Noreen Hulteen bill of costs, $681.00 served on 8/30/07 [04-16087]
09/10/2007	86	MANDATE ISSUED with costs taxed against aplt in the amount of $681 [04-16087]

DATE	NO.	PROCEEDINGS
10/29/2007	87	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 07-5543 filed on 10/24/07. [04-16087]
06/27/2008	88	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/23/2008. Supreme Court Number 07-543

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C 01 1122 MJJ

NOREEN HULTEEN, ELEANORA COLLET, LINDA PORTER, ELIZABETH SNYDER, and all others similarly situated, and COMMUNICATIONS WORKERS OF AMERICA,
Plaintiffs,

v.

AT&T CORP., AT&T MANAGEMENT PENSION PLAN, AT&T PENSION PLAN, and AT&T EMPLOYEES' BENEFIT COMMITTEE,
Defendants.

THE PARTIES' JOINT STIPULATIONS OF FACT IN SUPPORT OF THEIR RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT

Date:	February 25, 2003
Time:	9:30 am.
Judge:	Judge Martin J. Jenkins
Courtroom:	11

Plaintiffs Noreen Hulteen, Eleanora Collet, Linda Porter, Elizabeth Snyder and Communications Workers of America, AFL-CIO ("CWA"), and defendants AT&T Corp., AT&T Management Pension Plan ("MPP"), AT&T Pension Plan ("PP"), and the AT&T Employees' Benefit Committee, by and through their undersigned attorneys, hereby agree to the following Joint Stipulations Of Fact.

Each party who has entered into these Agreed Joint Stipulations of Fact reserves the right to

contest the relevancy and/or materiality of any of the stipulations contained herein. Further, the stipulations are for purposes of summary judgment only.

Parties and Related Entities

1. Plaintiffs Noreen Hulteen ("Hulteen"), Eleanora Collet ("Collet"), Linda Porter ("Porter") and Elizabeth Snyder ("Snyder") ("individually named plaintiffs") are females who, prior to 1979, began employment with Pacific Telephone and Telegraph Co. ("PT&T"), a Bell System operating company and who later became employees of AT&T Corp.

2. Each of the individually named plaintiffs took one or more leaves of absence on account of pregnancy, childbirth, and/or a related medical condition (hereinafter "pregnancy leave") from work at PT&T prior to April 29, 1979 (the effective date of the Pregnancy Discrimination Act of 1978, an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(k) ("the PDA")).

3. At all relevant times, Plaintiff CWA has been and is the collective bargaining representative for the majority of non-management employees of AT&T, including those who worked for PT&T and other former Bell System operating companies prior to April 29, 1979.

4. Defendant AT&T Corp. is an employer as defined by 42 U.S.C. § 2000e(b) and 29 U.S.C. § 1002(5). Prior to 1992, AT&T Corp. was known as American Telephone & Telegraph Co. For purposes of these Agreed Joint Stipulations of Facts, unless otherwise stated, reference to "AT&T" shall mean AT&T Corp. from 1992 to the present and American Telephone & Telegraph Co. prior to 1992.

5. PT&T was a Bell System operating company and a subsidiary of AT&T prior to 1984.

6. AT&T is a named fiduciary within the meaning of 29 U.S.C. § 1102(a) of the MPP and PP, and is a plan sponsor of the MPP and PP within the meaning of 29 U.S.C. § 1002(16)(B)(i).

7. AT&T is a corporation authorized to do business and doing business in the Northern District of California.

8. Prior to the court-ordered divestiture of AT&T, which became effective on January 1, 1984, telecommunications and related services were provided throughout the United States by AT&T and its Bell System operating companies and related affiliated entities, which were subsidiaries of AT&T.

9. AT&T Management Pension Plan ("MPP") is, and has been for all purposes relevant to this lawsuit, an employee pension benefit plan for management employees of AT&T as defined in 29 U.S.C. § 1002(2), and a defined benefit plan as defined in 29 U.S.C. § 1002(35).

10. AT&T Pension Plan ("PP") is, and has been for all purposes relevant to this lawsuit, an employee pension benefit plan for non-management employees of AT&T as defined in 29 U.S.C. § 1002(2), and a defined benefit plan as defined in 29 U.S.C. § 1002(35).

11. AT&T is, and has been, the plan administrator and sponsor of the MPP and the PP.

12. AT&T has appointed the members of the AT&T Employees' Benefit Committee ("EBC") at all times relevant to this lawsuit.

13. At all times relevant to this lawsuit, the EBC has and had the discretionary authority to resolve claims for benefits and "Term of Employment" ("TOE") under the MPP and the PP.

14. The EBC is a named fiduciary within the meaning of 29 U.S.C. § 1102(a) of the MPP and PP.

15. The EBC has appointed, at all times relevant to this lawsuit, the Pension Plan Administrator. Since 1995, the Pension Plan Administrator has had the authority to grant or deny all claims for benefits and TOE under the MPP and the PP to the extent such authority is, and has been, delegated by the EBC. The Pension Plan Administrator is a named fiduciary within the meaning of 29 U.S.C. § 1102(a) of the MPP and PP.

16. The EBC has appointed, at all times relevant to this lawsuit, the Benefit Claim and Appeal Committee ("BCAC"). Until 1995, the BCAC had the authority to grant or deny all claims relevant to this lawsuit for benefits and TOE under the MPP and the PP to the extent such authority is, and has been, delegated by the EBC. The BCAC is a named fiduciary within the meaning of 29 U.S.C. § 1102(a) of the MPP and PP.

Net Credited Service Rules Utilized by AT&T and the Bell System Operating Companies, Including PT&T

17. As early as 1914, AT&T and its Bell System operating companies utilized a service crediting system that, for purposes of pension and other benefits, relied upon an employee's "term of employment." AT&T's 1914 Pension Plan defines "term of employment" as meaning a "period of continuous employment in the service of the Company." Later versions of the pension plans applicable to AT&T and its Bell

System operating companies, including PT&T, similarly define the term. Pursuant to these plans, pension benefits are determined, in part, based on an employee's TOE.

18. Under AT&T's service calculation system, a Net Credited Service ("NCS") date is maintained for all employees, from their initial date of hire until their retirement or termination of employment. An employee's NCS date consists of her original hire date and any adjustments made by any AT&T or Bell System operating company employer(s) for periods during which no service credit has been accrued. Thus, periods of leave or other breaks in service that are not credited result in a later NCS date than the employee's original hire date.

19. AT&T has used NCS for many employment-related purposes, including job bidding, shift preference, layoffs, eligibility for certain benefit programs, including pension eligibility, and benefit levels. NCS is and was used for these purposes during the individually named plaintiffs' terms of employment with PT&T and AT&T.

20. At varying points in time, collective bargaining agreements between AT&T and the CWA have contained provisions regarding the use of NCS as established by company practice to determine various employment-related benefits. The current agreement, effective May 12, 2002, incorporates Article 28 ["Seniority"] of the collective bargaining agreement between AT&T Corp. and CWA effective May 10, 1998 which provides, *inter alia*, as follows:

> Length of service (Net Credited Service as determined by the Employee's Benefit Committee) shall be taken into account in the treatment of

> employees insofar as the conditions of the business and the abilities of the employees permit.

This provision has been contained in the CWA-AT&T collective bargaining agreement since May 28, 1989.

21. AT&T employees' NCS dates have always been determined entirely by the personnel practices and procedures of AT&T and or its former Bell System operating companies.

22. The benefits provided to eligible employees under the PP and MPP are determined, in part, based upon each employee's TOE determined under the NCS calculation system.

23. The term "Net Credited Service" does not appear in the PP or MPP.

Individually Named Plaintiffs

24. Plaintiff Noreen Hulteen began working for PT&T on or about January 5, 1965.

25. Both AT&T's and PT&T's records reflect that on or about November 11, 1968, Hulteen began a pregnancy leave. Hulteen gave birth on January 12, 1969.

26. On or about February 24, 1969, while still on her pregnancy leave, Hulteen was hospitalized for surgery resulting from a medical problem unrelated to her pregnancy. Her doctor released her to return to work on or about July 9, 1969.

27. In anticipation of her disability for reasons unrelated to pregnancy, Hulteen requested that she be allowed to return to work prior to February 24, 1969 for one day in order to be eligible to receive NCS while on leave for reasons unrelated to her pregnancy. PT&T refused to allow Hulteen to return

for one day. As a result, Hulteen was away from work for a total of 240 days, including her time on pregnancy leave and time on leave for the unrelated medical condition.

28. As a result of her 1969 pregnancy leave and leave for the unrelated medical condition, PT&T in 1969 changed Hulteen NCS date from January 5, 1965 to August 3, 1965, a difference of 210 days. Hulteen was credited with 30 days of service during her total leave period of 240 days. Hulteen was aware that the policy in 1969 provided a maximum of 30 days' credit for pregnancy leaves.

29. On January 1, 1984, Hulteen became an employee of AT&T. When she became an employee of AT&T, Hulteen maintained the August 3, 1965 NCS date she had had as an employee of PT&T. When she became an AT&T employee, Hulteen was aware that her NCS date traveled with her from PT&T to AT&T.

30. At no time did AT&T adjust Hulteen's NCS date to include the previously uncredited time she was off work in 1969 due to pregnancy-related or non-pregnancy related disability.

31. Throughout her employment with PT&T and AT&T, Hulteen periodically received documents that contained the August 3, 1965 NCS date.

32. Hulteen has been a participant in the PP and is currently a participant in the MPP.

33. On March 31, 1994, AT&T sent Hulteen a letter informing her that unless she was placed in another position within AT&T before June 1, 1994, she would be involuntarily terminated from her job. Hulteen was not placed in another position within AT&T. Consequently, Hulteen's last day on the

AT&T payroll was June 1, 1994, at which point she retired and began receiving a monthly pension.

34. AT&T's MPP benefits calculations for Hulteen are based on her NCS date of August 3, 1965. Had either AT&T or PT&T or the EBC credited Hulteen for all or some of the previously uncredited time she was off work in 1965 due to disability during her PT&T pregnancy leave, and her subsequent absence due to a non-pregnancy related disability, the calculation of her benefits and the benefits she received under AT&T's MPP would have been correspondingly greater.

35. Plaintiff Eleanora Collet began working for PT&T on or about August 30, 1965.

36. Collet gave birth to her first child on September 3, 1974. PT&T's employment records reflect that PT&T calculated Collet's first official day of pregnancy leave to be September 10, 1974. PT&T's records reflect that Collet's last day on leave was January 5, 1975. This leave totaled 118 days.

37. As a result of her pregnancy leave, PT&T in 1975 changed Collet's NCS date from August 30, 1965 to November 26, 1965, a difference of 88 days. Collet was credited with 30 days of service during her total leave period of 118 days. At some point while employed by PT&T Collet became aware there had been a change to her NCS date.

38. Collet gave birth to her second child on December 11, 1975. PT&T's employment records reflect that PT&T calculated her first official day of pregnancy leave to be December 30, 1975. PT&T's records reflect that Collet returned to work on July 19, 1976. This leave totaled 201 days.

39. As a result of her 1975-1976 pregnancy leave, PT&T in 1976 changed Collet's NCS date from November 26, 1965 to May 17, 1966, a difference of 173 days. Collet was credited with 28 days of service during her total leave period of 201 days. At some time after this date, Collet took another non-pregnancy-related leave and her NCS date changed from May 17, 1966 to September 1, 1966.

40. On January 1, 1984, Collet became an employee of AT&T. When she became an employee of AT&T, Collet maintained the September 1, 1966 NCS date she had had as an employee of PT&T. When she became an AT&T employee, Collet was aware that her NCS date traveled with her from PT&T to AT&T.

41. At no time did AT&T adjust Collet's NCS date to include the previously uncredited time she was off work in 1974-75 or 1975-76 due to pregnancy-related disability.

42. Throughout her employment with PT&T and AT&T, Collet periodically received documents that contained her then-current NCS date.

43. Collet was a participant in the MPP.

44. In 1998, AT&T notified Collet that she could retire under the Voluntary Retirement Incentive Program ("VRIP"). The VRIP offered Collet the right to retire and receive enhanced pension benefits and other benefits.

45. On December 31, 1998, Collet terminated her employment with AT&T under the terms of the VRIP.

46. AT&T calculated Collet's VRIP pension benefits based on her NCS date of September 1, 1966. Had either AT&T or PT&T or the EBC credited Collet for

all or some of the previously uncredited time she was off work due to disability during her 1974-75 and 1975-1976 PT&T pregnancy leaves, the calculation of her benefits and the pension and other benefits she received under AT&T's VRIP would have been correspondingly greater.

47. Plaintiff Linda D. Porter began working for PT&T on March 13, 1967.

48. In or about May of 1968, when Porter was approximately seven months pregnant, PT&T required her to commence a pregnancy leave. The date she was required to begin her leave was before the onset of her pregnancy disability. On July 5, 1968, Porter gave birth. She remained on leave for approximately six or seven weeks following July 5, 1968. Porter was away from work a total of 103 days.

49. Porter became disabled due to this pregnancy on the day she gave birth, July 5, 1968.

50. As a result of her pregnancy leave, PT&T changed Porter's NCS date from March 13, 1967 to May 25, 1967, a difference of 73 days. She was credited with 30 days of service during her total leave period of 103 days.

51. In 1980, Porter became an employee of AT&T. When she became an employee of AT&T, Porter maintained the May 25, 1967 NCS date she had had as an employee of PT&T. When she became an employee of AT&T, Porter was aware that her NCS date traveled with her from PT&T to AT&T.

52. At no time did AT&T adjust Porter's NCS date to include the previously uncredited time she was off work in 1968 due to pregnancy-related disability or forced leave.

53. Throughout her employment with PT&T and AT&T, Porter periodically received documents that contained her NCS date.

54. Porter is a CWA member and a participant in the PP.

55. The value of Porter's future pension and/or any other NCS or TOE-determined benefits would be greater if PT&T, AT&T, or the EBC credited her for the time she was off work prior to and following July 5, 1968, the date she gave birth.

56. Plaintiff Elizabeth Snyder began working for PT&T on May 23, 1966.

57. On July 26, 1974, Snyder gave birth. Snyder began her pregnancy leave on July 29, 1974. Both AT&T's and PT&T's records reflect that Snyder remained on leave until on or about November 3, 1974. Snyder was away from work a total of 97 days.

58. During her pregnancy leave, Snyder experienced medical complications that prevented her from returning to work prior to November 3, 1974.

59. As a result of her pregnancy leave, PT&T in 1974 changed Snyder's NCS date from May 23, 1966 to July 29, 1966, a difference of 67 days. She was credited with 30 days of service during her total leave period of 97 days.

60. On June 1, 1980, Snyder became an employee of AT&T. When she became an employee of AT&T, Snyder maintained the July 29, 1966 NCS date she had had as an employee of PT&T. When she became an employee of AT&T, Snyder was aware that her NCS date traveled with her from PT&T to AT&T.

61. Throughout her employment with PT&T and AT&T, Snyder periodically received documents that contained her NCS date.

62. Snyder was a CWA member and a participant in the PP.

63. On March 1, 2000, Michael L. Brown, AT&T's Pension Plan Administrator, sent Snyder a letter stating, *inter alia*, that "[i]n preparing your claim for service credit for the period of your maternity leave of absence for review by the Employees' Benefit Committee, it was determined that you were not given service credit for the first 30 calendar days of your leave (as was the policy at the time). Therefore, I have authorized the Pension Service Center to adjust your Net Credited Service date by 30 days."[1] Other than the possible adjustment to Snyder's NCS as a result of this letter, at no time did AT&T adjust Snyder's NCS date to include the previously uncredited time she was off work in 1974 due to pregnancy related disability.

64. On April 28, 2000, Snyder voluntarily terminated her employment with AT&T pursuant to a Voluntary Termination Offer ("VTP"). Under the VTP, termination benefits were determined, in part, based on Snyder's adjusted NCS date. These benefits would have been greater if AT&T had calculated them to include the time she was on leave for her pregnancy-related disability.

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[1] Plaintiffs do not concede that defendants used an NCS date adjusted to reflect the additional 30 days the Pension Plan Administrator indicated in March 2000 she was entitled to in calculating her pension and related benefits. The parties agree that whether or not Snyder's NCS date was adjusted in the year 2000 does not affect the outcome of this Stage 1 proceeding.

65. In addition, AT&T's pension calculations for Snyder are based on her NCS date of either June 29, 1966 or July 29, 1966. Had either AT&T or PT&T or the EBC credited her for all or some of the previously uncredited time she was off work clue to disability during her 1974 PT&T pregnancy leave, the calculation of her benefits and the benefits she received under the pension plan would have been correspondingly greater.

PT&T's and AT&T's Maternity and Disability Policies

66. Prior to August 7, 1977, PT&T[2] treated pregnancy leaves as personal leaves and not as disability leaves.

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[2] Plaintiffs' class action lawsuit is not limited to AT&T employees who formerly worked for PT&T. Prior to April 29, 1979, the disability policies of AT&T and its subsidiaries did not treat pregnancy as a disability. Under these policies, employees on paid disability leave received full service credit for the period of their disability absence; employees on personal leaves of absence, including females on pregnancy leaves, received a maximum of thirty days service credit. The parties disagree about other aspects of the personal leave and disability policies of AT&T and its Bell System operating companies, and for purposes of Stage 1 proceedings and these Agreed Joint Stipulations of Fact, have agreed that the Court should consider American Telephone and Telegraph Co.'s and PT&T's pre-April 29, 1979 service credit, disability and personal leave policies and AT&T's current policies and practices used to determine service credit for pension and other purposes. By agreeing to proceed in this manner, plaintiffs do not waive their argument that the scope of this case should include the other Bell System operating companies. Likewise, defendants reserve their right to argue at a later time that certain policy variations may have existed among the various Bell System operating companies at various times.

67. Prior to August 7, 1977, employees of PT&T who took a personal leave of absence received a maximum of 30 days of service credit regardless of the length of the leave, and, if the leave was pregnancy-related, regardless of the duration of the pregnancy-related disability.

68. Prior to August 7, 1977, under the disability policies of PT&T, employees on disability leave for reasons other than pregnancy received full service credit for the entire period of their disability absence.

69. Defendants do not count periods of personal leave taken because of disability due to pregnancy, childbirth or related medical condition prior to August 7, 1977 in their current calculations of NCS for AT&T employees.

70. On August 7, 1977, PT&T adopted the Maternity Payment Plan. Under the Maternity Payment Plan, a female employee was entitled to begin a pregnancy leave at any time mutually agreeable to the employee and her personal physician. Pregnant employees were eligible for disability benefits for up to six weeks of leave and service credit was given for this period. If the disability lasted more than six weeks, it became a personal leave. Once an employee returned to work, up to an additional 30 days of service credit was available for leave time taken prior to delivery. Reinstatement to the same job and pay, or one of similar status and pay, was guaranteed to women who returned to work within six months following childbirth. From 1977 until January 1, 1984, PT&T did not make any adjustment to the service credit calculations of women who had been subject to the pre-Maternity Payment Plan policies.[3]

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[3] The parties dispute whether the Maternity Payment Plan was applied uniformly.

71. Between August 7, 1977 and April 29, 1979 (the effective date of the PDA), under the disability policies of PT&T, employees on non-pregnancy related disability leave received full service credit for the entire period of their disability absence.

72. Defendants do not count periods of personal leave taken between August 7, 1977 and April 29, 1979 because of disability due to pregnancy, childbirth or related medical condition in excess of the time provided for under the Maternity Payment Plan in their current calculations of NCS for AT&T employees.

73. Prior to August 7, 1977, employees of PT&T who took a personal leave of absence because of pregnancy and while on that leave became temporarily disabled for reasons unrelated to pregnancy, were ineligible for sickness or disability benefits or for NCS credit in excess of 30 days ("double disability").

74. Prior to August 7, 1977, under the disability policies of PT&T, employees on non-pregnancy related disability leave who became temporarily disabled for a different reason than their initial disability, were eligible for sickness and disability benefits and for NCS credit for the entire period of their disability leave of absence.

75. Defendants do not count periods of leave taken by women who became temporarily disabled due to pregnancy, childbirth or related medical condition prior to August 7, 1977 and who then became temporarily disabled for a non-pregnancy related reason in their current calculations of NCS for AT&T employees.

76. Between August 7, 1977 and April 29, 1979 (the effective date of the PDA), while the Maternity Payment Plan was in effect, employees whose pregnancy related disabilities lasted longer than six weeks and who then became temporarily disabled for a different reason than their initial pregnancy-related disability, received no NCS credit for the period of their non-pregnancy related disability.

77. Between August 7, 1977 and April 29, 1979 (the effective date of the PDA), while the Maternity Payment Plan was in effect, employees whose non-pregnancy related disabilities lasted longer than six weeks and who then became temporarily disabled for a different reason than their initial disability, were eligible for sickness and disability benefits and for NCS credit for the entire period of their disabilities.

78. Defendants do not count periods of leave taken by women who were temporarily disabled due to pregnancy, childbirth or related medical condition longer than six weeks during the period the Maternity Payment Plan was in effect and who then became temporarily disabled for a non-pregnancy related reason in defendants' current calculations of NCS for AT&T employees.

79. On April 29, 1979 (the effective date of the PDA), PT&T adopted the Anticipated Disability Plan ("ADP") which superseded the Maternity Payment Plan and provided service credit for pregnancy leaves on the same basis as leave taken for other temporary disabilities. In 1979, PT&T did not make any adjustment to the service credit calculations of women who had been subject to the pre-PDA policies of PT&T.

80. On April 20, 1979, CWA and AT&T bargained for and agreed to a Memorandum of Understanding

regarding the April 29, 1979 Anticipated Disability Plan ("ADP"). The ADP was intended to bring provisions of the old Maternity Payment Plan into compliance with the requirements of the PDA. The ADP continues in effect at AT&T.

81. Prior to August 7, 1977, under the policies in effect at PT&T, which may not necessarily have been uniformly applied, certain female employees were required to commence pregnancy leaves prior to the onset of pregnancy disability ("forced leave"). This leave was classified as personal leave. These employees did not receive more than 30 days' service credit for their entire pregnancy leave, including the period of time that they were placed on forced leave.

82. Prior to August 7, 1977, employees of PT&T who anticipated the need for a temporary disability leave for reasons other than pregnancy were not forced to begin their leaves at a specified time prior to the onset of their disability.

83. Between August 7, 1977 and April 29, 1979, (the effective date of the PDA), under the Maternity Payment Plan, pregnant employees of PT&T had the right to remain on their jobs until the date they and their physicians agreed a maternity leave should begin. The parties disagree as to whether this policy was applied uniformly during this period.

84. Defendants do not count periods of forced leave that occurred prior to April 29, 1979 (the effective date of the PDA) in their current calculations of NCS for AT&T employees.

85. Prior to August 7, 1977, under the policies in effect at PT&T, which may not necessarily have been applied uniformly, reinstatement to the same or similar job was not guaranteed at the expiration of

an employee's pregnancy leave ("failure to reinstate"). Employees who were not reinstated remained on personal leave. These employees did not receive more than 30 days' service credit for their entire pregnancy leave, including the period of time that they were unable to return to work.

86. Prior to April 29, 1979, employees of PT&T who were on temporary disability leaves for reasons other than pregnancy were generally guaranteed reinstatement to the same or similar positions at the expiration of their leave.

87. Between August 7, 1977 and April 29, 1979, (the effective date of the PDA), under the Maternity Payment Plan, pregnant employees of PT&T were guaranteed reinstatement to the same or similar jobs at the expiration of an employee's pregnancy leave. The parties disagree as to whether this policy was applied uniformly within PT&T during this period.

88. Employees of PT&T, who took pregnancy leaves prior to April 29, 1979 and were not reinstated at the time they were ready to return to work did not receive credit for the time they were denied reinstatement. Defendants do not count the time PT&T failed to reinstate employees in their current calculations of NCS for AT&T employees.

AT&T's Divestiture

89. In 1982, the United States District Court for the District of Columbia entered a consent decree and Modified Final Judgment ("MFJ") to resolve the government's anti-trust suit against AT&T. The MFJ required AT&T to divest certain Bell System operating companies and affiliated entities. The MFJ is reported at *U.S. v. Amer. Tel. & Tel. Co.*, 552

F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. U.S.*, 460 U.S. 1001 (1983).

90. The MFJ also required the recognition of pre-divestiture service by the newly-created regional telephone holding companies and their subsidiaries, including PT&T.

91. As of January 1, 1984, the MFJ effectuated the break-up of AT&T and its divestiture of the local Bell System operating companies, including PT&T. As a result, seven new, independent regional operating exchange companies were created to provide telecommunications and related services to seven regions of the country. These seven companies were Bell Atlantic, Pacific Telesis, Ameritech, U.S. West, Nynex, Bell South, and Southwestern Bell. PT&T became a part of Pacific Telesis. Following several corporate reorganizations, American Telephone & Telegraph Co. was renamed as AT&T Corp. in 1992. Prior to and/or effective as of January 1, 1984, many employees of the former Bell System operating companies became employees of AT&T and many AT&T employees became employees of the newly-created regional operating exchange companies.

92. The MFJ resulted in a Plan of Reorganization ("POR"), which was approved by the United States District Court for the District of Columbia in 1983. See *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub norm., California v. United States*, 464 U.S. 1013 (1983). The POR addressed numerous divestiture issues affecting employees of AT&T and the newly divested companies. Because service credit "affects eligibility for and computation of pension benefits . . . ; eligibility for post-retirement unfunded benefits . . . ; and eligibility for future contingent post-retirement pension in-

creases" and to ensure that there would be no loss of benefits due to the divestiture, the POR stated that "all employees will carry with them all pre-divestiture Bell System service regardless of the organizational unit or corporation by which they are employed immediately after divestiture." Further, the POR provided that "[n]ew interchange agreements, for a transitional period as specified below, will provide continued mutual recognition of post-divestiture service credit under the plans of the AT&T group of companies and the various regional holding companies, as well as the continued recognition of pre-divestiture Bell System service, for all plan-related purposes, between and among the plans that will be maintained by AT&T and the regional holding companies after divestiture." See POR at 284-86.

Administrative Prerequisites

93. Between June, 1994 and August 2002, each of the individually named plaintiffs filed charges of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") alleging that AT&T Corp. discriminated against her in violation of Title VII on the basis of sex and pregnancy.[4]

94. On December 29, 1998, the EEOC issued a Letter of Determination finding reasonable cause to believe that AT&T Corp. discriminated against plaintiff Hulteen "and a class of other similarly-situated female employees whose adjusted NCS date has been used to determine eligibility for a service or disability pension, the amount of pension benefits,

[4] The following are the dates that plaintiffs filed charges with the EEOC: Hulteen, June 28, 1994; Snyder, December 17, 1999; Collet, October 18, 1999; Porter, August 14, 2002.

and eligibility for certain other benefits and programs, including early retirement offerings."

95. On November 12, 1999, CWA filed a charge of discrimination against AT&T Corp. with the EEOC on behalf of its bargaining unit employees. CWA's charge alleged that AT&T Corp.'s continuing use of the NCS calculation system violates the Title VII rights of affected bargaining unit employees.

96. The EEOC issued a notice of right to sue to individually named plaintiffs and CWA on the following dates: Hulteen, March 15, 2001; Snyder, March 12, 2001; Collet, March 12, 2001; Porter, August 18, 2002; and CWA, March 19, 2001. The individually named plaintiffs and CWA filed suit in federal district court within 90 days of the issuance of their right to sue letters.

97. The individually named plaintiffs have complied with all the administrative prerequisites to filing a lawsuit alleging violations of Title VII.

98. None of the individually named plaintiffs filed a charge of discrimination with the EEOC or any state fair employment agency within 300 days of returning from their pregnancy leaves, within 300 days of the effective date of the PDA, or within 300 days of becoming an employee of AT&T.

99. CWA sent a letter to the EBC on November 5, 1999, requesting that AT&T provide service credit adjustments for female employees who took pregnancy leaves from AT&T and the Bell System operating companies prior to 1979 and received less service credit under company policies than male employees who took leaves because of non-pregnancy related temporary disabilities. The EBC never responded to CWA's letter.

100. Under the terms of the PP and MPP, additional service credit may be added to an employee's Years and Months of Service when an employee is reinstated to employment and receives back pay for the period of his/her absence from the payroll.

101. AT&T has the authority under the terms of the PP and MPP to interpret the Plans and to determine claims regarding whether employees are entitled to service credit or term of employment credit under Plan language. Defendant EBC has been delegated the discretion and authority to interpret and apply the PP and MPP for all purposes relevant to this case.

102. At various times relevant to this lawsuit, the Benefit Claim and Appeal Committee ("BCAC") and/or the Pension Plan Administrator have been delegated the initial discretion and authority to review and resolve all claims for benefits and/or service credit under the PP or MPP.

103. The EBC serves as the final review committee under the PP and MPP for appeals by participants of decisions of the BCAC or the Pension Plan Administrator.

104. Defendants have the authority to correct an employee's NCS date where it is determined that the date has been calculated incorrectly by AT&T and/or any Bell System operating company, or where it is determined that the change is necessary to comply with legal requirements.

ADDITIONAL STIPULATION

The parties stipulate that the exhibits contained in the Joint Appendix of Evidentiary Materials are authentic documents. Although the parties do not necessarily concede the relevance of all of the documents, the parties agree that these documents consititute otherwise admissible evidence for purposes of summary judgment.

Dated: November 19, 2002

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Dated: November 19, 2002

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 04-16087

NOREEN HULTEEN, *et al.*,
Plaintiffs and Appellees,

Vs.

AT&T CORP.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
Honorable Martin J. Jenkins, Presiding
Case No. CV-01-01122-MJJ

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Plaintiffs and Appellees Noreen Hulteen, Eleanora Collet, Linda Porter, Elizabeth Snyder, and Communications Workers of America, AFL-CIO (collectively "Plaintiffs"), respectfully submit this brief in support of the order by which the district court granted their motion for summary judgment on claims for discrimination on the basis of sex and pregnancy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended by the Pregnancy Discrimination Act of 1978, Pub.L.95-555, codified at 42 U.S.C. §2000e(k), effective April 29, 1979 ("the PDA"), and denied the cross-motion of Defendant and Appellant AT&T Corporation ("AT&T") as to those claims.

I. *INTRODUCTION*

AT&T's opening brief is a sleek vessel that arrives at this Court's docket loaded with red herrings, and sounding dire—but false—alarms about a 13-year-old decision of this Court, *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir.1991), *cert. denied* 502 U.S. 1050 (1992). Despite AT&T's exaggerated claims as to its demise, however, *Pallas* remains the controlling precedent in this case.

In this interlocutory appeal, AT&T attempts to shift the temporal and legal "frames of reference" within which the *Pallas* panel quite properly examined, and declared unlawful, the same facially discriminatory policy under which AT&T—in the mid-1990s and thereafter, in making individualized benefits determinations as to each Plaintiff upon retirement or termination of her employment after decades of service to the company—refused to grant Plaintiffs service credit for pregnancy leaves taken early in their careers on the same terms upon which it was then granting service credit to Plaintiffs' fellow

retirees who took leave during the same time period because of other temporarily disabling conditions.

AT&T contends that *Pallas* must be overruled, however, because the panel in that 1991 case did not adequately address the misguided claim of retroactivity AT&T presses in this interlocutory appeal, which is based on subsequent decisions of the United States Supreme Court on that issue. In that regard, AT&T reads far too much into *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and places undue reliance on the distinguishable case of *Lockheed Corp. v. Spink*, 517 U.S. 882, 89697 (1996), which reversed this Court's decision in *Spink v. Lockheed Corp.*, 60 F.3d 616 (9th Cir.1995).

Stretching even further to distort the analysis of its discriminatory decisionmaking, AT&T contends that *Pallas* must be overruled because it cannot be reconciled with the Supreme Court's recent decision in *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 100 (2002), regarding "continuing violation" theories that have no bearing on this litigation. And, for good measure, AT&T criticizes the *Pallas* Court for failing to consider whether the use of employees' Net Credited Service ("NCS") dates to determine pension benefits was an application of a "bona fide seniority system" within the meaning of §703(h) of Title VII, 42 U.S.C. §2003e-2(h) (hereafter, "§703(h)"), as interpreted in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

None of the Supreme Court or Ninth Circuit cases on which AT&T relies requires a reevaluation—much less the overruling—of *Pallas*. A finding that AT&T is liable for pregnancy discrimination under Title VII for its recent decisions to deny pension and termination benefits to Plaintiffs and other female employees

who took pregnancy leave before April 29, 1979, does not depend upon a retroactive application of the PDA. As the *Pallas* Court clearly understood, AT&T's discriminatory decisions to award lesser benefits to Plaintiffs than to similarly situated employees who took *non*-pregnancy-related disability leaves prior to the effective date of the PDA were *current*, individualized determinations made when and as each Plaintiff retired or terminated her employment in the mid-1990s and thereafter—*long after* the PDA came into effect, and within the applicable limitations period for the Title VII claims stated in the complaint. AT&T's retroactivity argument also fails to take account of *other* Supreme Court precedents, including *Bazemore v. Friday*, 478 U.S. 385 (1986), as well as Congressional enactments, including §706(e)(2) of Title VII, 42 U.S.C. §2000e-5(e)(2) (hereafter, "§706(e)(2)"), which provide the rules that govern this case, and which were not in any way diminished by *Landgraf*.

Nor did the *Pallas* Court—or the district court here—rely on a "continuing violation" theory to find the type of claims alleged in this case timely under the applicable statute of limitations. Unlike the plaintiff in *Morgan*, each member of the Plaintiff class can establish a discrete act of discrimination which "occurred" within the limitations period for Title VII claims, §706(e)—*i.e.*, the *application* of AT&T's facially discriminatory NCS system in the benefits determinations made as to each of them when they retired or terminated their employment in and after 1994. Moreover, it was only at that point, and not when they were initially denied service and seniority credit for their pregnancy leaves in the 1960s and 1970s, that the Plaintiffs suffered any cognizable injury from AT&T's facially discriminatory

policy with respect to their rights under the applicable AT&T Pension Plans and termination benefits plans offered in and after 1994.

Similarly, since AT&T's policy of using female employees' NCS dates to limit their pension benefits because of past pregnancy is discriminatory on its face, neither the *Pallas* Court nor the district court erred by rejecting the claim that this practice is an application of a "bona fide seniority system" under §703(h). That is, each time AT&T invokes its NCS system to determine what pension or termination benefits will be awarded to an employee who went out on a disability leave before April 29, 1979, it treats those employees *differently* depending on whether the leave was for pregnancy or for some other medical condition—with formerly pregnant female employees necessarily receiving lower pension benefits than employees who took comparable non-pregnancy-related leave during the same time period. Such an intentionally discriminatory system simply is not "bona fide" within the meaning of §703(h), and thus may be challenged whenever it is applied.

II. *JURISDICTION*

Plaintiffs accept AT&T's statement of jurisdiction, with two additional comments: First, AT&T does not dispute that Plaintiffs satisfied all applicable administrative prerequisites to suit alleging current violations of Title VII in connection with the calculation and payment of their pension and termination benefits. (JSF¶¶93-98)[1] Second, on October 22, 2004, this

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[1] All citations to the "JSF" are to the Parties' Joint Stipulations of Fact, filed November 19, 2002, at tab 58 in the Excerpts of Record ("ER"). Other citations to documents in the record shall be to "ER," followed by the tab (docket entry) number and page number(s), separated by a colon.

Court granted Plaintiffs' motion for an extension of time to file their answer brief by December 14, 2004. Thus, this answer brief is timely.

III. *STATEMENT OF ISSUES*

Under the PDA, which took effect as to the provision of fringe benefits on April 29, 1979, an employer must treat pregnant employees the same as other employees with temporary disabilities. In making benefits determinations in recent years as to individual employees under its Pension Plans upon retirement, and for purposes of certain termination programs, AT&T has awarded less service credit to employees who took pregnancy-related leave before the PDA, than to employees who took other types of medical or disability leave during that period. The specific issues presented in this appeal include:

1. Did AT&T commit an unlawful employment practice under 42 U.S.C. §2000e-2(a) and §706(e)(2) each time it applied its facially discriminatory NCS system to determine the value of Plaintiffs' pensions and other benefits when, in 1994 and thereafter, Plaintiffs retired or otherwise terminated their employment?

2. Did Plaintiffs timely challenge the discriminatory benefits determinations made by AT&T in the mid-1990s and thereafter within the limitations period prescribed by Title VII and the PDA?

3. Does the finding of liability as to AT&T on the claims of sex and pregnancy discrimination alleged in this case depend upon an impermissible retroactive application of the PDA?

4. Was AT&T's use of its facially discriminatory NCS system to determine Plaintiffs' pension and

termination benefits an application of a "bona fide seniority system" within the meaning of §703(h)?

IV. *STATEMENT OF FACTS*

The facts material to this appeal are undisputed, and may be briefly summarized as follows.

A. AT&T'S POLICIES REGARDING "TERM OF EMPLOYMENT" AND "NCS DATES."

At all relevant times, AT&T and its Bell System operating companies, including Pacific Telephone and Telegraph Co. ("PT&T"),[2] have used a service crediting system that, for purposes of determining pension benefits, relies on an employee's Term of Employment ("TOE"). (JSF¶17) AT&T also maintains an NCS date for each of its employees, consisting of the date on which the employee began working for AT&T, adjusted forward in time for any breaks in service and to account for leaves of absence for which no service credit has been accrued. *(See* JSF¶18) Nothing in the Pension Plans requires AT&T to calculate TOE using the NCS date, but it has chosen to do so. (JSF¶¶22, 23) Any practice that reduces an employee's NCS or TOE results in lowered pension and termination benefits.

B. AT&T'S TREATMENT OF PREGNANCY-RELATED LEAVES.

At all relevant times, AT&T employees who became temporarily disabled for reasons other than pregnancy have received full service credit for the entire period of their disability leave. (JSF¶¶68, 71)

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[2] For convenience, all further references to AT&T and its Bell System operating companies, including PT&T, shall be to "AT&T" unless the context requires Plaintiffs to distinguish between or among them.

Thus, such absences did not result in a forward adjustment of their NCS dates or any reduction in their TOE. However, prior to April 29, 1979, when the PDA took effect for purposes of fringe benefits, AT&T did not give full service credit to female employees who went out on pregnancy-related leave.

1. Pregnancy Leave Treated as "Personal Leave."

Prior to August 7, 1977, AT&T treated pregnancy-related leave as "personal leave" for which the employee received at most 30 days of service credit, and adjusted the employee's NCS forward by the number of days her leave exceeded 30 days. (JSF¶¶66-67) Beginning on August 7, 1977, under a short-lived Maternity Payment Plan ("MPP"), pregnant employees became eligible for up to six weeks of service credit for the period following delivery, in addition to up to 30 days provided for pre-delivery leaves. (JSF¶70) However, regardless of the length of time the employee was actually disabled by pregnancy, to the extent her pre-delivery leave exceeded 30 days or her post-delivery leave exceeded six weeks, the leave was deemed "personal leave" and resulted in a forward adjustment of her NCS date. (*Id.*)

2. "Forced Leaves" Prior to the Onset of and Following Some Pregnancy-Related Leaves.

Prior to August 7, 1977, AT&T also had a policy or practice of forcing some pregnant employees to take involuntary leaves of absence prior to the onset of any pregnancy-related disability. (JSF¶81) Other women were forced to stay out of work even after their period of pregnancy-related disability ended because there was no guaranteed right of return to their previous positions. (JSF¶85) AT&T classified

these involuntary leaves as "personal leaves," and the affected employees did not receive more than 30 days' service credit for the entire period they were out on leave. (*Id.*) In contrast, employees on disability leave unrelated to pregnancy were not required to start their leave before the onset of disability or to remain off the payroll once they were medically able to return to work. (JSF¶¶82, 86) With the adoption of the MPP on August 7, 1977, AT&T began to allow pregnant employees to remain on the job until the date they and their physicians agreed leave should commence, and guaranteed them reinstatement at the expiration of their pregnancy leaves. (JSF¶¶70, 83, 87)

3. Treatment of Non-Pregnancy-Related Disabilities Occurring During Pregnancy Leave ("Double Disability").

Prior to August 7, 1977, female employees who suffered a "double disability"—*i.e.*, who took a personal leave of absence because of pregnancy and, while on that leave, became temporarily disabled for reasons unrelated to pregnancy—were ineligible for sickness or disability benefits or for NCS credit in excess of 30 days. (JSF¶73) Once the MPP was implemented, employees whose pregnancy-related disability lasted longer than six weeks, and who then had a second disability, received no service credit for the period of their second disability. (JSF¶76) Because they began during pregnancy leave, these "double disabilities" were treated as "personal leave." In contrast, employees on nonpregnancy-related disability leave who suffered a second disability, were eligible for sickness and disability benefits and NCS credit for the entire time periods in which they remained eligible for disability benefits, which typi-

cally covered the entire period of absence. (JSF¶¶68, 71)

4. Adoption of the Anticipated Disability Program on April 29, 1979.

On April 29, 1979, the date the PDA took effect as to the provision of fringe benefits, AT&T implemented the Anticipated Disability Program ("ADP"), which superseded the MPP. (JSF¶¶79, 80) Under the ADP, which is still in effect today, service credit for pregnancy-related leave is provided on the same basis as leave taken for other temporary disabilities. (*Id.*)

The ADP was intended to bring AT&T into compliance with the PDA. (JSF¶80) However, the new plan did not include full service credit for pregnancy-related leaves taken before April 29, 1979. (JSF¶¶69, 72, 75, 78, 79, 84, 88) AT&T continued to use the NCS date previously computed for leave taken before April 29, 1979, and—although AT&T undisputedly has broad authority and discretion to "adjust" its employees' NCS dates (JSF¶¶11-16, 100-104), and has *in fact* exercised its discretion in this regard (*see* JSF¶63) —it has at no time restored time deducted due to pregnancy, forced leave, or double disability in calculating NCS dates for female employees who took pregnancy-related leave prior to that date. (JSF¶¶69, 72, 75, 78, 79, 84, 88) As a result, AT&T credits women who took pregnancy-related leave before the PDA with less service credit for pension purposes than similarly situated employees who took pre-PDA leave for other temporary disabilities.

C. EMPLOYMENT HISTORY OF THE NAMED PLAINTIFFS.

Each named Plaintiff took pregnancy leave prior to April 29, 1979. (JSF¶2) In accordance with the poli-

cies in effect prior to that date, each Plaintiff's NCS date was moved forward by the number of days she was on pregnancy leave, less the 30 days of service credit allowed for personal leave, thus reducing her total NCS. (JSF¶¶28, 37, 39, 50, 59) Each named Plaintiff left her employment with PT&T and became an AT&T employee prior to January 1, 1984, the effective date for the AT&T divestiture. (JSF¶¶1, 29, 40, 51, 60) The NCS date assigned to Plaintiffs by PT&T traveled with them to AT&T. (*Id.*) At no time after Plaintiffs became AT&T employees, did AT&T recalculate their NCS dates to include previously uncredited pregnancy-related disability leave. (JSF¶¶30, 41, 52, 63) As a consequence, each named Plaintiff receives or will, upon retirement, receive lower pension and termination-related benefits than employees of comparable tenure who took leave due to other disabilities. (JSF¶¶34, 46, 55, 64, 65)

AT&T terminated Hulteen's employment involuntarily pursuant to a reduction in force as of June 1, 1994. (JSF¶33) At that time, AT&T calculated Hulteen's pension benefits using her adjusted NCS date, and continues to pay her monthly pension checks based on that calculation. (JSF¶¶33, 34) Had AT&T credited Hulteen for some or all of the 210 uncredited days she was off work due to pregnancy leave and "double disability," her NCS date would have been earlier and, due to AT&T's reliance on NCS dates to calculate TOE, her pension benefits would have been greater. (JSF¶¶28, 34)

In 1998, AT&T notified Collet that she could retire early under the terms of a Voluntary Retirement Incentive Program ("VRIP") with enhanced pension and other benefits. (JSF¶44) On December 31, 1998, Collet terminated her employment with AT&T, at

which point she retired and began receiving a monthly pension. Had AT&T credited Collet for some or all of the 267 uncredited days she was off work due to pregnancy leaves she took in 1974-75 and 1975-76, her NCS date would have been earlier, her TOE would have been longer, and her pension benefits Would have been greater. (JSF¶¶39, 46)

Porter is a current AT&T employee. When she retires, the value of her pension and any pension-related benefits will be greater if AT&T credits some or all of the uncredited time during which she was forced to take pregnancy leave prior to her anticipated due date in 1968, and was off work due to pregnancy-related disability—a total of approximately 73 days. (JSF¶¶50, 55)

On April 28, 2000, Snyder voluntarily terminated her employment with AT&T pursuant to a Voluntary Termination Plan ("VTP"). (JSF¶64) In determining Snyder's VTP benefits in March 2000, AT&T exercised its discretion to "adjust" the NCS date Snyder had been assigned up to that point, ostensibly to correct an error in the amount of service credit she was awarded for a 1974 pregnancy leave. (JSF¶63; *but see id.*, n.1) AT&T also used Snyder's "adjusted NCS date" to calculate her TOE for purposes of determining her pension benefits. (JSF¶64) Because AT&T refused to credit Snyder with some or all of the additional time she was off work due to pregnancy leave in 1968, the value of her pension and related benefits was reduced. (JSF¶¶59, 65)

V. *SUMMARY OF ARGUMENT*

AT&T freely admits that it has discriminated on the basis of pregnancy, and that Plaintiffs and other similarly situated female employees receive reduced

pension benefits because AT&T denies them service credit for pregnancy leaves they took in the 1960s and 1970s, before the effective date of the PDA. The central issue in this case is *when* the unlawful employment practices ("UEPs") alleged in the complaint "occurred" within the meaning of Title VII.

The text of Title VII, along with relevant Supreme Court and Ninth Circuit precedents, including *Bazemore*, 478 U.S. 385, and *Pallas*, 940 F.2d 1324, establish the governing rule: Every time an employer makes a decision using a facially discriminatory policy, the employer commits a new act of discrimination that triggers a fresh limitations period. *See also* §706(e)(2). Under this rule, AT&T commits a new UEP each time it applies a formerly pregnant employee's NCS date—a date borrowed from its seniority system—in calculating her TOE, thus reducing her pension and other benefits when she retires or terminates her employment. There is no need to resort to the analysis in *Landgraf to* assess these *current* violations, which do not depend on a retroactive application of the PDA.

AT&T's arguments under *Morgan*, 536 U.S. 100, and *Teamsters*, 431 U.S. 324, are simply variations on the theme that it would have preferred it if the district court (and the *Pallas* Court) had relied upon *United Air Lines v. Evans*, 431 U.S. 553 (1977) instead of *Bazemore—as* the Seventh Circuit recently did in *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814 (7th Cir.2000)—and had thus rejected Plaintiffs' Title VII claims on the grounds that they are time-barred and rest on an application of a facially neutral seniority system. As we will demonstrate, however, unlike the plaintiff in *Morgan*, Plaintiffs do not rely on a "continuing

violation" theory to establish the timeliness of their Title VII claims, but rather on discrete UEPs by AT&T—*i.e.*, application of the discriminatory NCS system to determine their pension and termination benefits in 1994 and thereafter—which were challenged in EEOC charges timely-filed under §706(e). And, to the extent AT&T's use of its NCS system in this manner is an application of a "seniority system," it cannot claim the protection of §703(h) for employment decisions made under a "bona fide" seniority system, because AT&T's NCS system is facially discriminatory.

VI. *ARGUMENT*

When Title VII was first passed, it was unclear to what extent the statute—which prohibited employment discrimination on the basis of sex—prohibited discrimination on the basis of pregnancy. *Compare General Electric Co. v. Gilbert*, 429 U.S. 143, 136-40 (1976) (employer did not violate Title VII by failing to extend same benefits to pregnant employees it extended to other employees during disability leave), *with Nashville Gas Co. v. Satty*, 434 U.S. 136, 141-42 (1977) (employer violated Title VII by divesting employees on pregnancy-related leave of previously accumulated seniority).

In 1978, Congress resolved the tension between these cases by passing the PDA, which clarified its original intent that discrimination on the basis of pregnancy falls within the general prohibition against sex discrimination, and that employers must treat pregnancy the same as other temporarily disabling medical conditions for all employment-related purposes, including receipt of benefits under fringe benefits programs. 42 U.S.C. §2000e(k). With respect

to fringe benefits, which are at issue in this case, the PDA came into effect on April 29, 1979.

It is undisputed that, before the PDA, AT&T did not treat pregnancy the same as other temporary disabilities in calculating seniority or awarding service credit to employees upon retirement. Rather, employees on pregnancy-related leave received less seniority and service credit than similarly situated employees on other types of disability leave. Although AT&T changed its system on April 29, 1979, to give pregnant employees full seniority and service credit for leaves taken after that date, the company continues to apply its facially discriminatory pre-PDA policy to employees who took pregnancy-related leave before that date. Thus, over a quarter of a century later, when it calculates benefits for individual employees upon retirement and other benefits that are based on accumulated service credit, AT&T commits *new* acts of unlawful discrimination on the basis of sex and pregnancy by giving less credit to female employees who took pregnancy-related leave before the PDA than it gives to employees who took leave for other medical reasons during the same period.

Plaintiffs filed this class action against AT&T in March 2001, alleging that the company was committing current violations of Title VII by denying pension benefits and other termination-related benefits to female employees on the basis of their pregnancies. (*See* ER, Exh. B at 5) The district court granted Plaintiffs' motion for summary judgment on this claim. (ER 90:1-18) Finding itself bound by the holding and reasoning of *Pallas*, 940 F.2d 1324, the district court ruled that Plaintiffs had established such current violations of the PDA, and had timely challenged AT&T's discriminatory service crediting

system. (ER 90:7-18) For the same reason, the district court *rejected* AT&T's arguments—based on the Seventh Circuit's decision in *Ameritech*, 220 F.3d 814—that it discriminated only when it first denied Plaintiffs seniority credit for their pregnancy-related leave in the 1960s and 1970s, but not in the 1990s when the company used its facially discriminatory service crediting system to deny pension and termination benefits to these women. (ER 90:6, 13-14) The district court also rejected AT&T's argument, based on *Landgraf*, 511 U.S. 244, that imposing liability for its recent discriminatory benefits determinations would entail an impermissible retroactive application of the PDA. (ER 90:6, 14-16) As we will demonstrate, *Pallas* was correctly decided and the summary judgment entered on the strength of that decision should be affirmed.[3]

A. EACH TIME AT&T APPLIES ITS FACIALLY DISCRIMINATORY SERVICE CREDITING POLICIES TO DETERMINE A FORMERLY PREGNANT EMPLOYEE'S PENSION OR TERMINATION-RELATED BENEFITS, IT COMMITS A NEW UEP.

It is undisputed that, when an AT&T employee retires or is terminated from employment, AT&T determines his or her retirement and termination-related benefits by applying service crediting policies that treat pregnancy leaves differently—and less favorably—than non-pregnancy-related disability leaves of comparable length taken before April 29, 1979. In a case with "essentially identical" facts (ER 90:16), this Court has held that such policies are

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[3] Plaintiffs accept AT&T's statement of the applicable standard of review. (AOB 23)

facially discriminatory, and that application of them to formerly pregnant female AT&T employees constitutes a violation of Title VII and the PDA. *Pallas*, 940 F.2d at 1326-27. Moreover, because AT&T's policies are facially discriminatory, they are subject to challenge each time they are applied to reduce the retirement benefits the employee would otherwise receive. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 & n.5 (1989); *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1094 (6th Cir.1996); *see also* §706(e)(2).

In *Pallas*, this Court held that Pacific Bell's system, which denied service credit for pre-1979 pregnancy-related disability leave for purposes of retirement benefits determinations, facially violated the PDA. 940 F.2d at 1326-27. The Pacific Bell policies at issue in *Pallas* were identical to the AT&T service crediting system challenged here. Specifically, like AT&T, Pacific Bell measured an employee's length of service for purposes of determining retirement benefits using an NCS system, under which employees receive full credit for absences due to temporary disability, but not for time spent on "personal" leave for pregnancy. *Pallas*, 940 F.2d at 1326. After enactment of the PDA, these policies were changed to allow women with pregnancy-related disabilities to take "disability leave" rather than "personal leave." However, Pacific Bell—like AT&T in this case—implemented this change prospectively only, and continued to deny service credit to women who were disabled due to pregnancy before April 29, 1979. *Id.*

In *Pallas*, the plaintiff contended that Pacific Bell's failure to give credit for pregnancy-related disability was a current violation of the PDA. 940 F.2d at 1325. This Court agreed, based on its finding that Pacific

Bell's NCS system was "not facially neutral," as follows:

> The system used to determine *eligibility facially discriminates against pregnant women.* The system distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.

940 F.2d at 1327, italics added.

AT&T's service crediting system makes the same illegal distinction between similarly situated employees. Because of AT&T's ongoing application of its facially discriminatory policies, women who took pre-PDA pregnancy-related leaves receive less service credit than other similarly situated employees who took leaves of absence for other temporary disabilities during that period. (B91166-88) AT&T's use of NCS dates denies or reduces economic benefits to Plaintiffs and all similarly situated female employees as compared to similarly situated male employees with the same length of service but whose prior disability leaves were not pregnancy-related. *(See* JSF¶¶34, 46, 55, 64, 65)

Also directly on point is *Carter v. AT&T Co.*, 870 F.Supp. 1438, 1443-45 (S.D.Ohio 1994), *vacated as a condition of settlement*, 75 FEPC 866 (S.D.Ohio 1996), which addressed a challenge to the same NCS system at issue in this case. The *Carter* Court followed *Pallas*, holding that AT&T's service crediting system constituted a facial violation of Title VII and the PDA. *Id.* The plaintiff in *Carter* was denied pension-related benefits offered by AT&T in 1991 because she received only 30 days of service credit for

a pregnancy-related leave in 1967, despite having been forced by the company to stop working in her sixth month of pregnancy, before she became disabled. The *Carter* Court found that both the 1991 enhancement system and the company's denial of credit for pregnancy leave, violated Title VII:

> AT&T's system credits employees for temporary disability leave but not for temporary pregnancy leave. Title VII requires that men and women be treated alike, and when a company is allowed to enact a plan that distinguishes pregnancy from other temporary disabilities it violates the principles underlying Title VII. Moreover, AT&T required women to leave after six Months of pregnancy, but refused to give them more than one month of credit for this forced leave. Therefore, the company forced women to leave solely because they were pregnant, and refused to give them credit for the time they were gone. Since pregnancy is an immutable factor that is peculiar only to women, to treat it differently by applying a separate leave policy is sex discrimination. Thus, AT&T's enhancement plan incorporated disparate treatment based solely on gender, and such incorporation violates Title VII.

Id. at 1444.

The *Pallas* and *Carter* holdings that AT&T's service crediting system is facially invalid are consistent with decisions of the Supreme Court and this Court construing the PDA. *See Newport News Shipbuilding & Drydock Co. v. EEOC*, 462 U.S. 669, 684 (1983); *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 197-200 (1991); *Harriss v. Pan American Airways*, 649 F.2d 670, 678-79 (9th *Cir.1980).* As in those cases, AT&T's application of its facially discrimina-

tory NCS system constitutes intentional discrimination in violation of Title VII.

AT&T's policies not only contravene the directly applicable holdings in *Pallas* and *Carter*, but have also been consistently at odds with the EEOC's interpretation of Title VII. The EEOC's 1972 Sex Discrimination Guidelines, enacted long before the passage of the PDA, explicitly mandated that:

> [W]ritten and unwritten employment policies and practices governing matters such as . . . the accrual of seniority and other benefits and privileges . . . shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other temporary disabilities.

37 Fed.Reg., No. 66 (April 5, 1972), *codified as amended*, 29 C.F.R. §1604.10. As early as 1977, these Guidelines were upheld by the Supreme Court in *Satty*, 434 U.S. at 142, n.4.

The EEOC continues to interpret Title VII in the same manner today:

> Title VII has always prohibited an employer from failing to accord a woman on a pregnancy-related leave the same seniority . . . accorded those on other disability leaves.

29 C.F.R. §1604.10; App. A to §1610.11. Indeed, in its Compliance Manual, the EEOC explicitly interprets Title VII to prohibit employers from using discriminatory *pre-PDA* pregnancy leave rules to determine current retirement and related benefits:

> [E]mployers must treat pregnancy-related leaves the same as other medical leaves in calculating the years of service that will be credited in

> evaluating an employee's eligibility for a pension or for early retirement. [¶] These principles also apply to *pregnancy-related leaves taken before the effective date of the PDA*, where an employer uses years of service to establish eligibility for retirement benefits.

EEOC Compliance Manual, "Employee Benefits," http://www.eeoc.gov/policy/docs/benefits.html#B.%20Retirement%20Benefits%20(PDA), No. 915.003 (October 3, 2000; visited December 7, 2004).

Not surprisingly, AT&T relies on the decision of the Seventh Circuit in *Ameritech*, 220 F.3d 814, in which that Court—directly contrary to *Pallas*, but without so much as a *"cf."* cite to that case—upheld the employer's use of a similar service crediting system to calculate eligibility for an early retirement offering. However, *Ameritech* is not entitled to any weight in this Circuit, where *Pallas* is the governing precedent. *See Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir.1987). Furthermore, the Seventh Circuit's ruling failed entirely to acknowledge or distinguish this Court's directly contrary holding in *Pallas* that the Bell System NCS policies "facially discriminate[] against pregnant women." 940 F.2d at 1327; *see also EEOC v. Bell Atlantic Corp.*, 80 FEPC 164 (S.D.N.Y.1999) (*Ameritech* was wrongly decided with respect to service crediting system comparable to AT&T's NCS system). Plaintiffs respectfully submit that *Pallas* remains the controlling precedent for this appeal and, as we will discuss, none of AT&T's arguments about "continuing violation" theory," impermissible retroactive application of the PDA, or §703(h) undermine its status as such.

B. THE TIMELINESS OF THE TITLE VII CLAIMS ASSERTED IN *PALLAS* AND IN THIS CASE DOES NOT DEPEND ON THE "CONTINUING VIOLATION" THEORY ENUNCIATED IN *MORGAN*.

As we have noted, the discriminatory acts alleged as the basis of Plaintiffs' claims under Title VII and the PDA are benefits determinations AT&T made in 1994 and thereafter, under then-applicable Pension Plans and termination benefit plans offered by AT&T. Focusing on the wrong "decision point," AT&T contends that the *Pallas* Court and the district court erred by allowing former and current Bell System employees to bring "untimely" Title VII claims which, in essence, challenge the initial denial of service credit when their NCS dates were calculated back in the 1960s and 1970s, under a "continuing violation" theory that was abrogated in *Morgan*, 536 U.S. 100. This argument misconstrues Plaintiffs' claims, and is way off the mark.

Neither the *Pallas* Court nor the district court in this case relied on any "continuing violation" theory in finding that Plaintiffs' Title VII claims were timely asserted. Rather, these courts concluded that Plaintiffs can establish "discrete" current acts of discrimination, and resulting injury, which "occurred" within the applicable limitations period—*i.e.*, the application of AT&T's facially discriminatory NCS system in one or more benefits determinations made as to each of them when they retired or terminated their employment in 1994 or thereafter. §706(e)(2).

1. *Pallas* and the Decision of the District Court in This Case Are Consistent With Supreme Court Precedent Under Which a Facially Discriminatory Policy or Seniority System Can Be Challenged When Applied.

Plaintiffs' claims were properly brought under the well-established theory that each application of a facially discriminatory policy or seniority system is a new discriminatory act which triggers its own limitations period. *Lorance*, 490 U.S. at 912; *Bazemore*, 478 U.S. at 394-97; *Pallas*, 940 F.2d at 1326-27; *see also Morgan*, 536 U.S. at 113 ("[e]ach discrete discriminatory act starts a new clock for filing charges" challenging that act regardless of whether other acts also could have been, but were not, challenged at an earlier date).

In *Lorance*, the Supreme Court differentiated two kinds of policies that could result in discrimination, and the time-frame for challenging them: *facially neutral policies* that had to be challenged when adopted, even if adopted with discriminatory intent; and *facially discriminatory policies* that could be challenged at any time. 490 U.S. at 912. As to the latter, the *Lorance* majority explained, "There is no doubt, of course, that a facially discriminatory seniority system . . . (one that treats similarly situated employees differently) can be challenged at any time," even long after the system was first adopted, because such seniority systems "by definition discriminate each time they are applied." *Id.* at 912 & n.5.[4]

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[4] There was no disagreement in *Lorance* between the majority and Justice Marshall's dissent on this principle. The point of disagreement was that Justice Marshall would have held that a

A policy is discriminatory on its face if "discrimination is apparent from the terms of the policy itself" and does not require "referenc[e to] a fact outside the policy." *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 727 (3d Cir.1995); *see also Frank v. United Airlines, Inc.*, 216 F.3d 845, 853-54 (9th Cir.2000) (unlawful discrimination occurs whenever an employment policy "treats men and women differently on its face"); *Gerdom v. Continental Airlines*, 692 F.2d 602, 608 (9th Cir.1982) (where discriminatory treatment claim is based upon policy that on its face applies less favorably to one gender, plaintiff need not otherwise establish presence of discriminatory intent).

As this Court clearly explained in *Pallas*, the NCS system used by AT&T to calculate pension and termination benefits is facially discriminatory because it treats female employees who took pregnancy-related disability leave prior to 1979 less favorably than employees who took pre-1979 leave for other temporary disabilities. 940 F.2d 1327. Furthermore, application of such a facially discriminatory policy constitutes intentional discrimination regardless of the subjective motivation of the decisionmaker. *See Johnson Controls*, 499 U.S. at 197-200 (a facially discriminatory policy "evinces discrimination on the basis of sex" even if motivated by a benign purpose); *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir.2002) (by its very terms, facial discrimination is "intentional"); *Gerdom* 692 F.2d at 608.

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facially neutral system adopted with the intent to discriminate, like the one in *Lorance*, as well as a facially discriminatory system, like the one in *Bazemore*, 478, U.S. 385, could be challenged whenever they are applied to an employee. As we discuss in section VI.C.3, *post*, Justice Marshall's position was later codified by Congress in §706(e)(2).

In this case, AT&T applies its facially discriminatory NCS system each time it calculates an individual employee's retirement and termination benefits. Thus, each application of the discriminatory service crediting system triggers a new Title VII limitations period. *Pallas*, 940 F.2d at 1327. As *Pallas* recognized, this conclusion follows from the Supreme Court's analysis in *Bazemore*, 478 U.S. 385.

In *Bazemore*, the employer's facially discriminatory pay policies were based on its practice of maintaining a racially segregated workforce, which became unlawful once Title VII became effective as to the plaintiffs' public employer in March 1972. 478 U.S. at 390-91. Although the employer abandoned its old segregated system in 1972, and no longer discriminated on the basis of race in compensating new employees hired after Title VII, it did not eliminate the salary disparities between black and white employees that arose under the old system, and continued to make compensation decisions using the pre-Title VII pay structure for employees who were on the payroll before March 1972. *Id.* Plaintiffs sued to eliminate the pay discrepancies that were not corrected once Title VII took effect.

A unanimous Supreme Court held that the action could be maintained, 478 U.S. at 394-97, and left no doubt that perpetuating the pre-Title VII compensation policies was a separate, actionable violation of the statute. Because the pay structure was facially discriminatory, each paycheck was a new discriminatory act, and, thus, each paycheck could be challenged separately—regardless of whether the pay differential had its genesis in a discriminatory policy first implemented before Title VII. As the Court explained:

> [A] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.

Id. at 395-96, n.6.

The factors that rendered the employer's facially discriminatory compensation practices actionable in *Bazemore* are also present here. In *Bazemore*, even after the race discrimination that had adversely affected pay levels became illegal, the defendant continued to utilize the prior race-infected salary system; as a result, African-American employees continued to receive less pay than they would have absent the pre-Title VII discrimination. Similarly, AT&T enforces an NCS system that facially discriminates against female employees on the basis of pre-PDA pregnancies. AT&T's continued application of these NCS policies to Plaintiffs perpetuates the pre-PDA discrimination. As in *Bazemore*, the result is lower benefits paid to Plaintiffs. On these facts, AT&T has a present, ongoing duty—currently enforceable by Plaintiffs—to eliminate the differences in service credit caused by their pre-PDA discrimination. *Bazemore*, 478 U.S. at 396.

AT&T's reliance on *Evans*, 431 U.S. 553, and *Morgan*, 536 U.S. 100, is misplaced. First, these cases involved a "continuing violation" theory that Plaintiffs do not advance in this case. Furthermore, they involved "discrete acts" of discrimination that occurred *outside* the statutory charge-filing period, rather than current violations occurring—as here—*within* the limitations period. Thus, these cases do

not undermine *Bazemore* or *Pallas*, since Plaintiffs are challenging the current use of AT&T's discriminatory service crediting system.

In *Evans*, a female flight attendant was forced to resign in 1968 under United Airlines' "no marriage" policy. At that time, the employee filed no charge or lawsuit to challenge her termination. When Evans was rehired in 1972, she was subject to a *different* UAL policy that denied restoration of seniority to any employee who had previously resigned from the airline. Although any claim based upon the discrete act of forcing her resignation in 1968 was time-barred, Evans argued that UAL was guilty of a present, continuing violation of Title VII for not restoring her prior seniority, which she claimed gave "present effect to past, illegal forced retirement and perpetuat[ed] the consequences of forbidden discrimination." 431 U.S. at 557. The Supreme Court rejected this argument because there was no *present* violation of Title VII; UAL treated every rehired employee with a similar break in service in the same manner—all of them lost previously accrued seniority. *Id.* at 557-59. As the unanimous *Bazemore* Court reiterated in distinguishing *Evans:*

> [Ms. Evans] made no allegation that the seniority system itself was intentionally designed to discriminate. Because a lawsuit on the forced resignation was time barred, however, it was to be treated as an act occurring before the statute was passed, and therefore it had 'no present legal consequences,' [citation], even though 'It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.' [Citation.] *The "critical question,"*

> the Court declared, *'is whether any present violation exists."*

Bazemore, 478 U.S. at 396, n.6, italics added, *citing Evans*, 431 U.S. at 558.

Here the opposite is true: AT&T does not treat all employees who took leave because of disability the same way. It is this *present* disparate treatment that Plaintiffs challenge: AT&T's application of its discriminatory NCS system to determine valuable economic benefits upon retirement or termination, resulting in lower payments to Plaintiffs and other female employees who took leave for pregnancy-related disability than to employees who took leave for other temporary, non-pregnancy-related disabilities.

Insofar as it has any relevance to this case, *Morgan* simply reiterated the holding in *Evans* that Title VII precludes recovery for "discrete" acts of discrimination occurring outside the EEOC charge-filing period.[5] 536 U.S. at 11213. Such acts cannot be deemed timely through the application of a "continuing violation" doctrine. *Id.* Plaintiffs' position in this case is entirely consistent with *Morgan*. It is the "discrete act" of determining their benefits using the facially discriminatory NCS system that Plaintiffs challenge in this case, and there is no dispute that the named Plaintiffs filed timely EEOC charges, and timely complied with all other administrative pre-requisites as to these acts, before filing suit. Accordingly,

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[5] The *Morgan* Court also explicitly referred to the *Bazemore* paychecks as actionable components of a discriminatory compensation system even though the initial salary discrimination began prior to the effective date of Title VII in that case. 536 U.S. at 111-12.

neither *Evans* nor *Morgan* undermines Plaintiffs' claims.

2. The Timeliness Analysis in *Ameritech* is Inapt and Unpersuasive.

What AT&T really seems to be arguing as to the timeliness of Plaintiffs' claims is that it believes the *Pallas* Court came down on the wrong side of what the Seventh Circuit in *Ameritech*, 220 F.3d 814, called the "subtle" line that separates "continuing" violations that arise with each new application of a discriminatory policy, as in *Bazemore* and this case, and past violations with present effects, as in *Evans*. AT&T's preference for the holding in *Ameritech* is, of course, no reason to re-evaluate or overrule *Pallas*.

In concluding that *Evans* provided a "better fit" than *Bazemore* in analyzing claims like Plaintiffs', the *Ameritech* Court relied on the admittedly "simplistic" grounds that *Evans*, like this case, involved a "seniority system." 220 F.3d at 823.[6] But this reasoning betrays a profound misunderstanding of *Evans*, and the critical differences between the "seniority system" in that case and the instant one. In *Evans*, the seniority system itself was "bona fide" and free of discrimination—*i.e.*, it applied equally to men and women, denying credit for prior service for all employees who were rehired after having been terminated. Application of the seniority system, therefore, was not an "independently discriminatory" act, *see Morgan*, 536 U.S. at 113, even if it worked to the det

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[6] As in the proceedings below, Plaintiffs do not dispute AT&T's claim that the policies and practices under which it made Plaintiffs' benefits determinations constitute a "seniority system" within the meaning of Title VII. (AOB 5-6, 44-50.)

riment of employees who had suffered earlier acts of discrimination.

In this case, by contrast, the seniority system is *itself* discriminatory. Like the employer in *Ameritech*, AT&T "freely admits" that its pre-PDA policy on seniority credit for pregnancy-related leave was facially discriminatory, and could not pass muster under the PDA if adopted today. *See* JSF¶¶66-68, 80. AT&T also admits that currently, when making benefits determinations under its pension and termination benefits plans, it utilizes a calculation borrowed from its facially discriminatory pre-PDA policy to treat employees who took pre-PDA disability leave differently depending on whether the leave was for pregnancy or some other temporarily disabling medical condition. JSF¶¶68-72. Together, these admissions establish that the seniority system in effect today remains facially discriminatory on the basis of pregnancy. Thus, under *Lorance* and §706(e)(2), each application of AT&T's "seniority system" is a separate discriminatory act. In *Pallas*, the Ninth Circuit correctly recognized that *Bazemore*, rather than *Evans*, provides the legal framework for resolution of this issue. 940 F.2d at 1327.

None of the other considerations mentioned by the Seventh Circuit in *Ameritech* are grounds for finding Plaintiffs' claims to be untimely. The *Ameritech* Court suggested that the employer had not engaged in "intentional discrimination" because, given its belief that the PDA did not apply retroactively, the company "had no reason to think" it could not use existing seniority dates for decisions made after the Act came into effect. 220 F.3d at 823. But this conclusion does not logically follow. Ameritech—and AT&T—knew or should have known that after the

PDA came into effect, they could no longer discriminate on the basis of pregnancy, even if they could have done so before. However, whether or not Ameritech consciously recognized its obligations under the PDA is irrelevant. Good faith is not a defense to intentional discrimination, *Parker v. Sony Pictures Entm't*, 260 F.3d 100, 112-13 (2d Cir.2001), and a facially discriminatory policy is *always* treated as intentionally discriminatory, *Lovell*, 303 F.3d at 1057; *Frank*, 216 F.3d at 853-54; *Gerdom*, 692 F.2d at 608.

The *Ameritech* Court also flatly asserted that the employees should have complained "long ago," because they "knew the minute they took their pregnancy . . . leaves that they were not getting full credit for their time off-in other words, the women were barred from raising the issue because they did not sue in the 1960s or 1970s. 220 F.3d at 823. This rationale is untenable after the Supreme Court's decision in *Morgan*, where the Court *rejected* the Seventh Circuit's rule that employees must sue as soon as they reasonably could have recognized they had suffered discrimination or else be barred from ever raising the claim. 536 U.S. at 117-18 & n.11. The Court instead sided with the Ninth Circuit's more flexible formulation, which allowed employees to sue within 180 or 300 days after a UEP "occurs," whether or not the employees could also have sued at an earlier date. *Id.*

Besides *Pallas*, several other courts have rejected *Ameritech's* timeliness analysis, recognizing that an employer commits a UEP whenever it denies pension benefits based on pre-PDA seniority policies that discriminated on the basis of pregnancy. *Maki v. Allete, Inc.*, 383 F.3d 740, 742-44 (8th Cir.2004), *rhg. denied* (Nov.10, 2004); *EEOC v. Bell Atlantic*, 80 FEPC 164;

Carter, 870 F.Supp. at 1445; *see also Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1011 (10th Cir.2002) (criticizing *Ameritech's* "fine-line" efforts to limit *Bazemore* and noting that no other circuit has agreed with that interpretation).

The timeliness discussion by the *Maki* Court is particularly apt. In that case, the plaintiffs were terminated in the 1950s and 1960s pursuant to long-since abrogated policies of their employer, Allete, Inc., which prohibited married and pregnant women from working at the company. 383 F.3d at 742. However, the women were rehired in the 1980s, and worked for the company until they retired between 1999 and 2003. *Id.* at 742-43. Allete's pension plan provided benefits based on years of "continuous employment" but, after the passage of Title VII, the employer had amended its plan to include some non-continuous prior service when calculating pension benefits at least twice—in 1976, to "bridge" any prior employment if the length of the bridge was shorter than the length of the prior employment; and again in 1987, to "bridge" prior employment if the break in service was less than five years. After the most recent version of the plan was adopted in 1998, various female employees asked Allete to amend its bridging provisions to include women previously terminated due to its past discriminatory marriage and pregnancy policies. In April 2002, Allete denied the request, citing a "careful review" by its legal department. As a result, the plaintiffs' prior service did not qualify for bridging and was not included in their pension benefits calculation. *Id.*

The *Maki* plaintiffs alleged that Allete's denial of service credit for women who were terminated in the 1960s under the company's marriage and pregnancy

policies was intentional discrimination in violation of Title VII and the PDA. 383 F.3d at 742-45. The district court granted Allete's motion to dismiss on two theories: First, because the plaintiffs were terminated in the 1960s, prior to the passage of Title VII, the trial court ruled that their complaints must be dismissed because Title VII cannot be applied retroactively; and second, the statute of limitations on discriminatory acts that took place in the 1960s had long since expired. *Id.* at 743. The Eighth Circuit reversed on both grounds. *Id.* at 745.

In analyzing the timeliness issue, the *Maki* Court rejected the employer's argument that the plaintiffs' claims were time-barred, holding it was *only* upon retirement, when the allegedly discriminatory "bridging" provisions were applied to them, that the plaintiffs suffered any cognizable damage. 383 F.3d at 744-45. Had the claims been made any earlier—*e.g.*, when the bridging provisions were adopted in 1976 and 1987—they would have been dismissed as "unripe" since the plaintiffs had not yet been injured by the discriminatory service crediting policy. *Id.*, *citing Auerbach v. Bd. of Educ.*, 136 F.3d 104, 109 (2nd Cir.1998) (dismissing as unripe claims that provision in retirement plan was discriminatory because employees had yet to retire); *Stewart v. M.M.&P. Pension Plan*, 608 F.2d 776, 784-85 (9th Cir.1979) (affirming dismissal of suit against pension plan because plaintiff had not yet retired or applied for retirement benefits); *see also Pallas*, 940 F.2d at 1327. By contrast, the *Ameritech* Court did not consider whether the plaintiffs could have stated a claim under Title VII or the PDA in the 1960s and 1970s as to their rights under the relevant Pension Plans. No other court has accepted *Ameritech's* approach to this issue, and this Court should reject it as well.

3. Under 706(e)(2), a Facially Discriminatory Seniority System Can Be Challenged When Applied, Even Long After Adoption.

The *Ameritech* Court's timeliness analysis is also inconsistent with §706(e)(2), which was enacted by Congress as part of the Civil Rights Act of 1991, Pub.L.102-166, 1991 Stat. 1745 ("the CRA of 1991"). In that regard, Title VII was amended to include a provision that overruled *Lorance* in part, to clarify *when* a challenge to a facially discriminatory seniority system could be brought, as follows:

> [A UEP] occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority system), when the seniority system is adopted, when an individual becomes subject to the seniority system, *or when a person aggrieved is injured by the application of the seniority system or provision of the system.*

§706(e)(2). Specifically, the CRA of 1991 overruled the holding in *Lorance* that a facially neutral system must be challenged when adopted, even if it was enacted with an intent to discriminate, and instead codified the reasoning of the dissent in *Lorance*, which would have held both a facially discriminatory system, like that in *Bazemore* and here, and a facially neutral system adopted with the intent to discriminate, like the one in *Lorance*, could be challenged when applied. Significantly, however, the Act did not overrule the *Lorance* Court's conclusion that *a facially discriminatory* system could be challenged at any time. Rather, it underscored and codified the Supreme Court's conclusion that a facially discrimi-

natory system—such as AT&T's—can be challenged whenever it is applied to an employee.

AT&T's facially discriminatory system is, by its very construct, intentional discrimination. *See, e.g., Lovell*, 303 F.3d at 1057. Accordingly, under Title VII as amended by the CRA of 1991, Plaintiffs could challenge AT&T's service crediting system—if, as AT&T contends, it is deemed a seniority system—not only when adopted, but also when they were "injured by the application of the seniority system." §706(e)(2). Plainly, Plaintiffs in this case were "injured" when AT&T calculated and awarded valuable economic benefits using its facially discriminatory NCS system, causing them and other female employees who took pre-PDA pregnancy leaves to receive lesser retirement benefits than employees who took disability leave for other reasons.[7]

Moreover, as we have noted, some courts would hold that Plaintiffs were *required* to wait until the facially discriminatory NCS system was applied to them upon retirement or termination—*i.e.*, until an individualized calculation of TOE was made and less

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[7] In this regard, the district court's decision finding Plaintiffs' claims to be timely is consistent with case law which has allowed challenges to retirement benefits and related policies if timely filed after benefits are denied. *E.g., Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1057-58 (2d Cir.1982) (1974 sex discrimination challenge to pension plan adopted in 1952). It is also consistent with recent cases in other employment discrimination contexts, holding that facially discriminatory policies and seniority systems can be challenged when applied, not just when adopted. *See Mullins v. Crowell*, 228 F.3d 1305, 1311-12 (11th Cir.2000) (disability discrimination); *Anderson v. Zubieta*, 180 F.3d 329, 336 (D.C. Cir.1999) (discrimination on the basis of citizenship); *EEOC v. Kentucky State Police Dept.*, 80 F.3d at 1094 (age discrimination).

valuable benefits conferred—before they could file the Title VII claims asserted here. *Maki*, 383 F.3d at 744-45, *Auerbach*, 136 F.3d at 109; *Pallas*, 940 F.2d at 1327; *Stewart*, 608 F.2d 776 at 784-85. Such a holding would be consistent with §706(e)(2), which was enacted by Congress in 1991 to, *inter alia*, discourage the sort of premature, unproductive litigation the *Lorance* and *Ameritech* holdings would foster. *See* H.R.Rep.No. 102-40(I), at 60-61 (requiring employees to challenge discriminatory seniority rules before they have "suffered any real injury" from application would "force[] the filing of speculative charges," "produce[] unnecessary litigation," and "cause[] needless strain on employment relationships"); *id.* at 153 (minority view) (problem is particularly acute with respect to seniority systems, which "often are adopted years before they have an impact on an individual's employment rights").

At a minimum, by enacting §706(e)(2), Congress clearly evinced an intent to authorize the types of claims Plaintiffs brought in this case to challenge a facially discriminatory seniority system when it was applied to deprive them of benefits upon retirement or termination. Thus, *Pallas* and the district court's decision on the timeliness of Plaintiffs' claims are plainly correct and should not be disturbed.

C. HOLDING AT&T LIABLE FOR CURRENT USE OF ITS FACIALLY DISCRIMINATORY NCS SYSTEM TO DENY PENSION AND TERMINATION-RELATED BENEFITS TO PLAINTIFFS BECAUSE OF THEIR PREGNANCIES, IS NOT AN IMPERMISSIBLE RETROACTIVE APPLICATION OF THE PDA UNDER *LANDGRAF*.

AT&T's principal claim of error in this interlocutory appeal is a more elaborate, overheated version of

an argument it made below, to wit: Although *Pallas* is on all fours with this case, AT&T claims that case involved an impermissible retroactive application of the PDA, which the *Pallas* court failed to discuss and which cannot withstand scrutiny under the intervening decision of the Supreme Court in *Landgraf*, 511 U.S. 244. With passionate rhetoric and melodramatic flourishes that cannot compensate for the serious analytical flaws in its argument, AT&T portrays *Landgraf* and its progeny as having wrought a "sea change" and a "radical" new approach to retroactivity analysis that requires this Court to reconsider—and overrule—*Pallas*. Despite AT&T's best efforts to obfuscate this issue, however, neither the decision in *Pallas* nor the district court's ruling below gives the PDA impermissible "retroactive" application.

1. In *Landgraf* and Other More Recent Cases, the Supreme Court and This Court Have Clarified and Refined the Analysis For Determining Whether a Federal Statute Is Being Given Impermissible Retroactive Effect.

In *Landgraf*, 511 U.S. 244, the Supreme Court established a two-part test for determining if a statute may be applied retroactively. First, the court "must determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If Congress has done so, and there is no constitutional impediment to the exercise of its power in that regard, there is no need to resort to judicial default rules. *Id.* at 265-68, 280; *see also Spink*, 517 U.S. at 896-97. However, if Congress has *not* clearly stated its intent, "the court must determine whether the new statute would have *retroactive effect*, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past

conduct, or impose new duties with respect to transactions already completed." *Landgraf* 511 U.S. at 280, italics added.[8]

A statute does not have an impermissibly retroactive effect, however, merely because it "draws upon antecedent facts for its operation," or "upsets expectations based in prior law." *Id.* at 269-70 & n.24. "Rather, the court must ask whether the new provision attaches *new legal consequences* to events *completed* before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270, emphasis added. In considering a law's retroactive effect, the court's analysis is guided by three "familiar considerations," *i.e.*, reasonable reliance, fair notice, and settled expectations. *Id.* at 280.

In *Landgraf*, there was no question as to which past events or conduct by the defendant were "relevant" for purposes of the Court's retroactivity analysis, or *when* the relevant acts occurred. It was beyond dispute that the issue of compensatory and/or puni-

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[8] In *Landgraf*, the Supreme Court was asked to decide if two specific provisions of the CRA of 1991 could be applied to a sexual harassment case that was pending on appeal when the statute was enacted, *i.e.*, when it was signed by the President on November 21, 1991. 511 U.S. at 247-49. The *Landgraf* Court held that neither § 102(a), which established the right to recover compensatory and punitive damages for intentional discrimination violative of Title VII, nor § 102(c), which authorized any party to demand a jury trial if such damages are claimed, could be applied "retroactively," *i.e.*, to impose new forms of relief for acts of sexual harassment that occurred before the effective date of the Act. 511 U.S. at 280-86.

tive damages arose only as to specific conduct by the defendant or its employees that might have given rise to a "hostile environment" sexual harassment claim—conduct that occurred in 1986, long before the CRA of 1991 was enacted. 511 U.S. 247-49, 283-84.

This Court had occasion to consider that issue, however, in a case on which AT&T relies, *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir.1995). This Court held that it is crucial to identify the specific conduct alleged to be affected by the new statute:

> [T]he proper focus of retroactivity analysis is the conduct that would be affected by the law. [Citation.] Retroactive application of a law means that it changes the legal consequences of conduct that took place before the law went into effect. *If however, the law changes the legal consequences of conduct that takes place after the law goes into effect, the law operates on that conduct prospectively.* That is, so long as Congress establishes the legal consequences of conduct prior to the conduct taking place, there is no issue of retroactivity.

52 F.3d at 814-15. As we will discuss, because the conduct at issue in this case occurred in and after 1994, long after the PDA's effective date, retroactivity is simply not an issue here.

2. Neither *Pallas* Nor The Decision of the District Court in This Case Gives Impermissible Retroactive Effect to the PDA.

AT&T makes several overblown arguments to support its claim that the *Pallas* Court—and the district court in this case on similar facts involving the same service crediting system—erred by giving "retroac-

tive" effect to the PDA. First, AT&T suggests Congress made clear its intent that the PDA should have prospective effect only. (AOB 31-32 & n.5) Even if it did not, however, AT&T claims that *Pallas* created new obligations or liabilities with respect to "completed" conduct or transactions—*i.e.*, the employees' pre-PDA maternity leaves—and "clearly upset . . . settled expectations" that the 1979 amendments to the service crediting rules would have prospective effect only. (AOB 29-30) AT&T further contends that *Pallas* "changed the legal consequences of the Bell System's treatment of pre-PDA pregnancy leaves" by converting what was, by its lights, a "perfectly legal" form of discrimination against pregnant women before April 29, 1979, into a practice that violated Title VII thereafter. (AOB 30-31) AT&T is wrong on all counts.

a) The Discriminatory Conduct Alleged As the Basis of AT&T's Liability in This Case Was Never "Lawful" After the Passage of Title VII.

Contrary to AT&T's argument based on *Gilbert*, pregnancy discrimination was *not* "perfectly legal" in the 1960s and 1970s when—notwithstanding the enactment of Title VII's ban on sex-based employment discrimination in 1964—AT&T's predecessor-in-interest, PT&T, continued to enforce its discriminatory policies of denying service credit for pregnancy leave in excess of 30 days while awarding full credit for all other types of disability leave, and forcing female employees to go out on pregnancy leave even when they were perfectly able to perform their jobs.

Indeed, both the EEOC and every Court of Appeals decision prior to *Gilbert* had found that pregnancy-based employment discrimination "[was] always ille-

gal under Title VII" as a type of sex discrimination, *Carter*, 870 F.Supp. at 1443-44, *and see Gilbert*, 429 U.S. at 146-47 (Marshall, J., dissenting), and less than a year after *Gilbert* was decided, the Supreme Court significantly *narrowed* that decision when it found that a form of pregnancy discrimination similar to AT&T's in this case was a UEP under Title VII. *Satty*, 434 U.S. at 139-42 (invalidating employer's policy of depriving women of accumulated seniority when returning from maternity leave). Soon after the PDA took effect, moreover, the Supreme Court noted that the PDA "made clear" what Congress had intended all along: that Title VII's prohibition against sex discrimination was, from its inception, intended to apply to pregnancy discrimination. *Newport News*, 462 U.S. at 678-79, n.17.[9]

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[9] Whether Congress intended the PDA to be retroactive, or to be applied prospectively only has never been decided by the Supreme Court or this Court. However, in *Newport News*, 462 U.S. 669, the Court held that Congress unambiguously disapproved both the holding and reasoning of *Gilbert* by enacting the PDA, which it viewed as "necessary to *reestablish* the principles of Title VII law" as it was understood prior to *Gilbert*. 462 U.S. at 678-79; *see also* H.R.Rep.No. 95-948, 95th Cong., 2d Sess. 2 (1978) ("It is the Committee"-s view that the dissenting Justices correctly interpreted the Act."); S.Rep.No. 95-331, 95th Cong., 1st Sess. 2-3 (1977) (*Gilbert* dissenters "correctly express[ed] both the principle and the meaning of Title VII.") Indeed, Congress knew that, in a post-*Gilbert* decision, the Supreme Court had itself limited *Gilbert* by holding that policies that denied seniority because of pregnancy violated Title VII. *Satty*, 434 U.S. at 141-42. In prescribing a specific future date—180 days after enactment—on which the PDA would take effect for purposes of fringe benefits, Congress merely wanted "to provide for an orderly and equitable transition, with the least disruption for employers and employees," while "recogniz[ing] the pressing need to make nondiscriminatory coverage mandatory as soon as practicable." H.R.Rep.No. 95-948 at 8. After *Rivers v. Roadway*

This history reveals a critical legal distinction between *Pallas* and a recent Supreme Court retroactivity decision, *Spink*, *517* U.S. 882, which AT&T contends tacitly "overruled" *Pallas*. In *Spink*, the Court examined the 1986 amendments to ERISA and the Age Discrimination in Employment Act ("ADEA"), which were included in the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), Pub.L. 99-509, 100 Stat. 1874., which prohibited age discrimination in pension plans. Up to that point, ERISA and the AREA had specifically *allowed* the type of age discrimination alleged by the plaintiff in *Spink:* exclusion from pension plans if the employee was over the age of 60 when hired. *See* 29 U.S.C. §§1052(a)(2), 623(0(2) (1982 & Supp.V 1988).

By contrast, no pre-PDA federal statute had ever made it "legal" to deny service credit to women disabled by pregnancy. In fact, as we have noted, the Supreme Court in *Satty* held a policy that deprived women of accumulated seniority credit after maternity leave was a UEP under Title VII. The pre-1979 policy at issue in *Pallas* and in this case similarly de-

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Express, Inc., 511 U.S. 298 (1994), we know that "restorative" civil rights legislation such as the PDA is not entitled to a presumption of retroactivity, and that the legislation must be examined for a clear statement by Congress that it intended the statute to have retroactive effect. *Id.* at 311-12. But without the benefit of the "clarified" retroactivity rules announced in *Landgraf* and *Rivers*, it would be unreasonable to apply the analysis of those cases *retroactively* to a statute enacted by Congress sixteen years earlier. Thus, although Congress clearly stated that it always intended Title VII's prohibition of sex discrimination to cover pregnancy discrimination, and that the PDA merely "reestablish[ed]" the pre-*Gilbert* law, the most that can be said is that Congress *did not* clearly intend the PDA to be prospective only.

nied service credit to women disabled by pregnancy, and was illegal under *Satty*. Because *Spink* dealt with a very different set of factual and legal circumstances,[10] it simply cannot be said to have overruled *Pallas*.

b) AT&T's Liability Under the PDA in This Case is Not Based on Any Conduct or Transactions That Were "Completed," and Does Not Upset Any Reasonable Expectations That Were "Settled," as of 1979.

AT&T's claim that the *Pallas* Court—and, by extension the district court here—created new obligations or liabilities with respect to transactions that were already "completed" when the PDA came into effect, focuses on the wrong "transactions" and ignores the law governing its conduct both before *and* after the PDA took effect. In essence, AT&T contends that once the Plaintiffs completed their pre-PDA maternity leaves, and AT&T "did the math" to determine their NCS dates upon return to work, they were instantaneously barred from receiving any pension or termination benefits based on the time in excess of 30 days that they were out on pregnancy leave. This is simply untrue. AT&T's calculations of Plaintiffs' NCS dates in the 1960s and 1970s were not determinations of their rights under the relevant Pension Plans—*i.e.*, those in force in the mid-1990s and later—or of their eligibility for benefits under termination plans that did not even exist at the time.

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[10] It is also noteworthy that—unlike this case—*Spink* did not involve an injury to the plaintiff resulting from the application of a seniority system, which may be challenged *whether or not* the system was challenged when it was adopted, or when it was applied on prior occasions. *See* §706(e)(2).

AT&T's argument also overlooks the fact that AT&T is not required to, but has simply elected to use a facially discriminatory device—NCS dates—as a surrogate measure of the real criterion for determining the value of pension and termination benefits: the employees' TOE. There is no dispute that AT&T has, and always has had, ample authority and discretion to adjust the Plaintiffs' NCS dates, for purposes of its Pension Plans and termination benefits programs, to ensure equal treatment of all its employees with respect to service credit for prePDA disability leaves. It has simply refused to do so.

While AT&T's calculation of Plaintiffs' NCS dates may have deprived them of certain seniority-based perquisites (e.g., priority in job bidding and shift assignments) both before the PDA was enacted and at various times thereafter, Plaintiffs' rights to receive *pension and termination benefits* were not fixed or determined until the mid-1990s or later, when they reached retirement age or otherwise qualified for benefits under AT&T's Pension Plans, the VRIP, or the VTP. Thus, it was not until AT&T had to make a determination of Plaintiffs' "exit" benefits based on their TOE, and chose to apply its facially discriminatory NCS system, that there was any "transaction" involving an injury that could form the basis for a claim under Title VII or the PDA. *See Maki*, 383 F.3d at 744-45; *Auerbach*, 136 F.3d at 109; *Pallas*, 940 F.2d at 1327; *Stewart*, 608 F.2d 776 at 784-85.

AT&T's claim that *Pallas* "clearly upset the settled expectations" of the parties that the 1979 amendments to the service crediting rules would have only prospective effect is equally unavailing. In light of the unanimous decisions of the Courts of Appeals that preceded *Gilbert*, the Supreme Court's decision in

Satty in 1977, the consistent interpretation of Title VII in the EEOC Guidelines since the early 1970s, the floor debate on and passage of the PDA in 1978, the Supreme Court's decisions in *Bazemore* in 1986 and *Lorance* in 1989, this Court's decision in *Pallas* in 1991,[11] the enactment of §706(e)(2) in the CRA of 1991, the decision of the District Court for the Southern District of Ohio in *Carter* in 1994, and the settlements in *EEOC v. Bell Atlantic* and other Bell System cases, it is utterly disingenuous of AT&T to argue that it *ever* had "settled expectations" that it was not required to give full service credit for pre-PDA pregnancy leaves when making pension and termination benefits determinations—as it always has for other employees who took disability leaves for other medical conditions during the same period.

c) The *Pallas* Court Correctly Focused on AT&T's Current Acts of Discrimination.

Of course, at bottom, it is irrelevant whether AT&T's pre-PDA service crediting system violated Title VII, or whether Congress intended the PDA to be retroactive. AT&T is not being held liable for limiting Plaintiffs' service credit for pregnancy-related leave back in the 1960s and 1970s, or for the loss of any employment opportunities or benefits they might have suffered at that time. Rather, Plaintiffs' claims are based on *current* violations of Title VII—*i.e.*, discriminatory benefits determinations made in 1994 and thereafter, in which AT&T *denied* female employees service credit for pregnancy-related disability

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[11] Curiously, AT&T never explains why it apparently believed it did not have to comply with the *Pallas* decision, and adjust its service crediting system accordingly—at least as to its operations within the Ninth Circuit—once that decision became final upon the denial of certiorari in early 1992!

leaves, while *granting* service credit to other similarly situated employees who took disability leave for other medical reasons.

AT&T's retroactivity objections to *Pallas* are also undermined by analogous decisions of the Supreme Court both before and after *Landgraf* As we have noted, a statute has retroactive effect only if it impairs a vested right or creates a new liability for a past act, not merely because it "draws upon antecedent facts for its operation." *Landgraf*, 511 U.S. at 269, n.24. So, for example, a new law is not impermissibly retroactive when it requires a recalculation of data from past years if the new figures are to be used only for future decisions, and not to recoup past payments. *Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998) (Medicare reimbursements to teaching hospitals for graduate medical education). Similarly, a company cannot maintain a facially discriminatory salary structure merely because it was adopted before Title VII's passage. *Bazemore*, 478 U.S. at 395-96. These scenarios do not involve impermissible retroactive application of a statute because only future decisions are affected by the new law. No new liability attaches for decisions made before the law took effect.

The only acts alleged as unlawful here are AT&T's decisions denying equal benefits when each of the Plaintiffs and similarly situated female employees retired or were terminated *in the mid-1990s and thereafter*—decisions made *long after* the PDA came into effect. Thus, it is legally irrelevant that AT&T thought it was allowed to discriminate against pregnant employees before the PDA, because *after* the PDA the company was legally obligated to treat pregnancy like any other temporary disability. It is this crucial distinction that was recognized in *Pallas*,

940 F.2d at 1326-27. Indeed, the decisions challenged in this case were made more than 15 years after Congress made clear that pregnancy discrimination was *and always had been* illegal under Title VII, and admonished the Supreme Court that an intentionally discriminatory employment policy or seniority system can be challenged whenever it is applied to individual employees, *whether or not* the discriminatory effect was apparent, and *whether or not* it was challenged, when it was adopted by the employer. In short, Plaintiffs are not trying to impose liability on AT&T for acts that took place before the PDA. They seek relief only for its post-PDA decisions.

Recently, using an analysis similar to that of *Pallas*, the Eighth Circuit upheld Title VII claims of four female employees who were terminated in the 1950s and 1960s pursuant to policies that prohibited married and pregnant women from working at the company, rehired in the 1980s, and then denied credit for their earlier service when their pensions were calculated more than a decade later. *Maki*, 383 F.3d at 742-45. *Maki* rejected the argument that the plaintiffs' Title VII claims gave rise to retroactivity concerns, holding that it was only upon retirement, when the employer applied its discriminatory "bridging" provisions, that the plaintiffs suffered actionable injury. *Id.* at 744-45. Thus, the *Maki* plaintiffs—like the plaintiffs in *Pallas* and this case—were not seeking a retroactive application of Title VII and it was error to dismiss on that ground. *Id.* at 743.

d) The Supreme Court's Post-*Landgraf* Retroactivity Decisions Have Not Undermined *Pallas*.

In a last-ditch attempt to salvage its argument that *Pallas* has been overruled by *Landgraf* and its prog-

eny, AT&T contends that the Supreme Court's "reasoning" on the retroactivity issue in *Spink*, 517 U.S. 882, "confirms" that the *Pallas* panel gave impermissible retroactive effect to the PDA. (AOB 33-35) However, the Supreme Court's narrow decision in *Spink* simply does not have the sweeping effect AT&T suggests.

Spink involved this Court's construction of certain substantive provisions of OBRA as affording relief from a "bait-and-switch" ploy by an employer, Lockheed, that had allegedly promised the plaintiff he could participate in its pension plan, even though he was over the age of 60 when he was hired in 1979 and the plan by its own terms—and as explicitly permitted by ERISA and ADEA before OBRA—excluded him. 517 U.S. at 884-85; *and see* 60 F.3d at 618-19. In 1984, Lockheed reneged on its promise, telling the plaintiff he was not eligible to participate in the plan because he was over 60 when hired. Pursuant to a crystal-clear provision for prospective-only application, OBRA repealed the age-based exclusion effective December 25, 1988, providing that the amendment would apply *"only with respect to service performed on or after such date." See* 29 U.S.C. §1052(a)(2), italics added. Lockheed thereafter admitted the plaintiff to membership in its plan, but told him it would not credit his pre-OBRA years of service. 517 U.S. at 885.

After retiring in 1990, Spink sued Lockheed seeking, among other things, credit for his pre-OBRA service. *Spink*, *517* U.S. at 886. In this regard, Spink's claim rested on two *other* substantive provisions of OBRA, which also provided for prospective-only application, but which did not include the additional italicized language quoted in the preceding paragraph. *Id.* at 885-86. Interpreting those two provi-

sions expansively, and finding them to apply retroactively, this Court held that Lockheed was prohibited from excluding Spink's pre-OBRA years of service. *Id.* at 886-87. Devoting only a single paragraph to the issue, the Supreme Court reversed this Court's retroactivity ruling, holding that Congress had clearly prescribed the "temporal effect" of the two substantive provisions on which Spink relied, using language that "compels the conclusion that the provisions are prospective." *Id.* at 896-97. The Supreme Court's reasoning went no further than to state that where, as there, "the temporal effect of a statute is manifest on its face, `there is no need to resort to judicial default rules.'" *Id.; Landgraf*, 511 U.S. at 280.

In what can only be described as a twisted use of precedent, AT&T suggests that the Supreme Court's succinct, narrowly focused treatment of the retroactivity issue in *Spink* somehow "endorsed" the elaborate, but deeply flawed, reasoning by which this Court had found the two other inapposite OBRA amendments to be retroactive. It is thus the "reasoning" of a decision of this Court that the Supreme Court *reversed*, and clearly *did not endorse*, upon which AT&T actually relies for its argument that *Pallas* has been overruled. Never mind that the decisions of this Court and the Supreme Court in *Spink* nowhere mentioned *Pallas* or the PDA.

AT&T's nonsensical argument notwithstanding, the Supreme Court did not discuss and so certainly cannot be deemed to have "rejected" what AT&T calls this Court's *"Pallas/Spink* method of retroactive statutory construction." AT&T offers no other basis upon which this Court could conclude that the Supreme Court has *sub silentio* overruled *Pallas*. To the contrary, the failure of both the Supreme Court and

this Court to cite or discuss *Pallas* strongly supports a conclusion that *Pallas* remains the governing law of this Circuit in the present context. *See United States v. Sharpe*, 470 U.S. 675, 694, n.6 (1985) (Marshall, J., concurring) ("Legal reasoning hardly consists of finding isolated sentences in wholly different contexts and using them to overrule *sub silentio* prior holdings.")

D. AT&T'S FACIALLY DISCRIMINATORY SERVICE CREDITING SYSTEM IS NOT ELIGIBLE FOR PROTECTION AS A BONA FIDE SENIORITY SYSTEM UNDER §703(h).

AT&T's final contention is that it cannot be held liable under Title VII for using its service crediting system to limit Plaintiffs' pension and termination benefits because it was simply applying a "bona fide seniority system" within the meaning of §703(h) of Title VII. In an argument that borders on the frivolous, AT&T further claims that *Pallas* must be overruled—or, at a minimum, may, be ignored by the panel assigned to hear this appeal—simply because it did not *cite* the Supreme Court's decision in *Teamsters*, 431 U.S. 324, which AT&T calls the "leading" case and "controlling authority" construing that provision. (AOB 7, 4450) These claims should be rejected.

1. The *Pallas* Panel's Failure to Cite *Teamsters* Neither Diminishes the Authoritativeness of Its Decision In That Case, Nor Requires This Court to "Overrule" It.

AT&T takes a giant logical leap—and, in the process, insults the *Pallas* panel - by suggesting that the absence of a citation to *Teamsters* means that the *Pallas* Court did not even bother to consider the Su-

preme Court's decision in that case. (AOB 44-45, n.6) This argument is untenable.

In *Pallas*, this Court discussed *Lorance*, 490 U.S. 900, in which the Supreme Court debated the applicability of §703(h) and the numerous decisions in which it had interpreted that provision in cases challenging seniority systems—including *Teamsters* and its progeny. 940 F.2d at 1326; *and see Lorance*, 490 U.S. at 904 09; *id.* at 915-16, n.2 (Marshall, J., dissenting). The *Pallas* Court also carefully considered *Evans*, 431 U.S. 553, which was decided in the same Supreme Court session as *Teamsters*, and which considered various §703(h) issues in the more relevant context of a claim of sex discrimination. Thus, this Court should reject out of hand AT&T's demand that *Pallas* be overruled or disregarded simply because it failed to specifically reference the *Teamsters* case.

2. AT&T Has Not, in Any Event, Established That its Service Crediting System is a "Bona Fide Seniority System."

AT&T further contends, however, that the *Pallas* panel must not have considered the *Teamsters* decision because, if it had, it could not possibly have reached the conclusion it did on the §703(h) issue. Once again, upon evaluating the merits of AT&T's §703(h) argument, it amounts to little more than a declaration that it prefers the decision of the Seventh Circuit in *Ameritech* to this Court's decision in *Pallas*. (AOB 48-50)

Assuming AT&T's policy of using NCS dates to determine pension and termination benefits is a type of "seniority system," it simply does not qualify as "bona fide" within the meaning of §703(h). AT&T's argu-

ment to the contrary fails because it is at odds with this Court's decision in *Pallas* that such a system is facially discriminatory. Rather than explaining how its position can be squared with *Pallas* (which it cannot be), AT&T relies exclusively on *Ameritech*, 220 F.3d 814. *Ameritech* not only does not control this case, but it is poorly reasoned.

AT&T argues that no intent to discriminate can be established here because the NCS system was adopted before Title VII, and its system was held to be "lawful" in 1976 in *Gilbert*. (AOB 48) We have already discussed at length why AT&T's argument about the pre-PDA "lawfulness" of its NCS system should be rejected. *See* §VI.C.2.a, *ante*. In Teamsters, moreover, the Supreme Court expressly held that a seniority system is *not* afforded protection under §703(h) if, prior to enactment of Title VII, the system was adopted for the purpose of discriminating on the basis of race or sex, even though federal law did not forbid such discrimination at the time. 431 U.S. at 324; *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (standard for determining legality of pre-Act seniority system same as standard for post-Act system); *Pullman v. Swint*, 456 U.S. 273, 278-79 (1982) (seniority system adopted in 1954 could be held unlawful if structured for a discriminatory purpose).

As *Pallas* clearly held, the NCS system used by AT&T to calculate pension benefits is *not* facially neutral, 940 F.2d at 1327, and both this Court and the Supreme Court have held that the application of such a system is a form of intentional discrimination. *Johnson Controls, Inc.*, 499 U.S. at 199-200 (fetal protection policy was facially discriminatory, and therefore intentional discrimination); *Leslie Frank v.*

United Airlines, Inc., 216 F.3d 845, 854 (9th Cir.2000); *see also Lovell*, 303 F.3d at 1057; *Frank*, 216 F.3d at 853-54; *Gerdom*, 692 F.2d at 608.

AT&T contends, however, that *Teamsters* immunizes its NCS system because it merely "perpetuates" or "freezes in" pre-PDA discrimination. (AOB 46-50) AT&T misreads *Teamsters*. In that case, the challenged departmental seniority system favored employees who had worked as line drivers over those with longer plant-wide tenure. Because the line driver department was segregated prior to Title VII, the plaintiff argued that the system unlawfully "perpetuated" the effects of past discrimination. However, unlike the system here, the seniority system in *Teamsters* "applie[d] equally to all races and ethnic groups," and to the extent it "lock[ed]" employees into non-line driver jobs, it did so for all. *Id.* at 355-56. Those who were discouraged from transferring to line driver jobs were not all minorities; to the contrary, the overwhelming majority were white. *Id.* On the other hand, the Court clearly held that where an intention to discriminate exists with respect to the establishment or continuation of a seniority system, the system is not "bona fide." *Id.* at 353.

Contrary to AT&T's claims, Plaintiffs here do not attack discriminatory effects of an otherwise neutral rule. Rather, following *Pallas*, they challenge AT&T's current application of a facially discriminatory policy used to compute benefits for women who took pregnancy-related leave prior to the PDA that is the "result of an intention to discriminate because of . . . sex." Accordingly, §703(h) does not excuse or insulate AT&T's conduct. *See Teamsters*, 431 U.S. at 353.

VII. *CONCLUSION*

For all the foregoing reasons, this Court should affirm the summary judgment in favor of Plaintiffs, and remand so the district court can fashion appropriate relief.

Dated: December 14, 2004

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for the Plaintiffs declares that there are no other cases related to this case of which we are aware.

Dated: December 14, 2004

Respectfully submitted,
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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16087

NOREEN HULTEEN, ELEANORA COLLET, ARMA HORTON, ELIZABETH SNYDER, and COMMUNICATIONS WORKERS OF AMERICA,
Plaintiffs-Appellees,

v.

AT&T CORPORATION,
Defendant-Appellant.

On Interlocutory Appeal from the United States District Court for the Northern District of California

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Brief of the Equal Employment Opportunity Commission as Amicus Supporting Appellees and Affirmance

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency established by Congress to administer, interpret, and enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and other federal statutes prohibiting employment discrimination. The Commission therefore has an interest in how this Court decides questions that affect the enforcement of Title VII. The appellant in this case is urging this Court to overrule *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991). *Pallas* involved Pacific Bell's use of a service-crediting system that credited women who took pregnancy leaves before the effective date of the Pregnancy Discrimination Act ("PDA") with less seniority than employees who took leave for other temporary disabilities. The Court held that the defendant's ongoing use of that service-crediting system violated Title VII. The Commission believes that *Pallas* remains good law, and the agency recently filed a Title VII enforcement action against Lucent Technologies, Inc., in the Central District of California challenging the same service-crediting system at issue in *Pallas* and in this case. *EEOC v. Lucent Technologies*, No. 04-8168 (C.D. Cal. complaint filed Sept. 30, 2004). Accordingly, the Commission offers the Court its views.

STATEMENT OF THE ISSUE

Whether this Court's holding in *Pallas v. Pacific Bell* that an employer violates Title VII as amended by the Pregnancy Discrimination Act when it chooses to base current decisions about benefits on a service-crediting system that on its face discriminates on the basis of pregnancy is still good law.

STATEMENT OF THE CASE

1. *Proceedings*

This is an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), from an order entered on August 8, 2003, by the United States District Court for the Northern District of California (Jenkins, J.). The order granted plaintiffs' motion for partial summary judgment with respect to liability on their Title VII claims against AT&T. R.88.

Plaintiffs filed this action in March 2001, alleging that AT&T has been violating Title VII and ERISA by continuing to rely, in its current decisions about termination and retirement benefits, on a service-crediting system that discriminates on its face on the basis of pregnancy. R.1. The parties filed cross motions for summary judgment in November 2002. R.53-54. The district court entered an order on August 8, 2003, partially granting and partially denying each side's motion. R.88.

On August 21, 2003, AT&T asked the district court to amend its order by certifying it under 28 U.S.C. § 1292(b). R.94. The court granted that motion on September 24. R.101. On October 10, AT&T filed a § 1292(b) petition with this Court, which was docketed in this Court as appeal number 03-80107. On February 27, 2004, this Court granted the company's petition and re-docketed the appeal as number 04-16087.

2. *Statement of Facts*

AT&T and its predecessors have used their "net credited service" ["NCS"] system for decades to determine their employees' years of service and seniority for all purposes: both for competitive employment-

opportunity decisions like bidding for positions and shifts, and laying employees off and hiring them back; and for determining eligibility for, and levels of, various types of benefits. Excerpts of Record ("ER"), R.58 ("Parties' Joint Stipulation of Facts") ("JSF"), ¶¶ 17, 19. The system keeps track of an employee's term of employment by starting with the employee's first day of work, and then moving that date forward for periods when the employee did not work and did not receive NCS credit. JSF, ¶18.

Until 1977, AT&T classified pregnancy leave as personal leave. JSF, ¶ 66. Accordingly, no matter how long the pregnancy leave — or the pregnancy-based disability — lasted, the company gave an employee taking pregnancy leave only 30 days of NCS credit, even though it granted employees who suffered non-pregnancy-related disabilities NCS credit for as long as they remained disabled JSF, ¶¶ 67-68. This differential treatment was exacerbated by three related policies or practices: (a) pregnant employees were often forced to go out on leave before they wanted to and before they were disabled by the pregnancy; (b) employees who took pregnancy leave had no guaranteed right of reinstatement once certified as medically fit to return to work; and (c) employees who developed a non-pregnancy-related disability while out on pregnancy leave did not receive any NCS credit for that second disability, even though an employee with that disability would usually receive full NCS credit for it. JSF, ¶¶ 73-74, 81-82, 85-86. In addition, personal leave (including pregnancy leave) was unpaid leave, while employees with non-pregnancy-related disabilities were paid between 50 and 100 percent of their regular salaries (depending on their years of service) while they were disabled. R.59, "Joint Appendix of Evidentiary Materials," Vol.

1, Ex. 7 (Testimony of Therese Pick dated Aug. 1, 1972), pp. 9-10.

Starting in August 1977, AT&T ameliorated its original plan slightly by: (a) granting six weeks of NCS credit for pregnancy leave instead of only 30 days; and (b) eliminating forced leaves. JSF, ¶¶ 70, 83. The major change in defendant's treatment of pregnancy leave, however, came in April 1979, when the Pregnancy Discrimination Act became effective. Defendant then adopted its "Anticipated Disability Plan," which is still in effect today. JSF, ¶ 79. Under that plan, AT&T grants service credit for pregnancy-related disabilities on the same basis that the company provides it for disabilities that are not pregnancy-related. JSF, ¶ 79. However, defendant chose to apply these two changes to its pregnancy-leave policy (the 1977 and 1979 changes) only to pregnancy leaves that were taken after the respective policies were put into effect. JSF, ¶¶ 69, 72, 75, 78-79, 84, 88.

The plaintiffs in this action are women who worked for defendant during the 1970s, took pregnancy leave before 1979, and either are still working for defendant or continued working for defendant until they recently retired. JSF, ¶¶ 1-2, 33, 44-45, 54, 64. When they retire, AT&T computes their retirement-benefit levels using their NCS dates. JSF, 1122. Accordingly, the company pays them lower benefits than it pays similarly situated retirees who had non-pregnancy-related disabilities before 1979. JSF, TT 34, 46, 55, 64-65.

3. *Decision Below*

The district court ruled that this case is clearly governed by *Pallas*, since the two cases are so similar on their facts, and it accordingly granted plaintiffs partial summary judgment as to liability on their

Title VII claims. ER, R.101 at 7-9, 21. The court carefully reviewed both the *Pallas* decision and AT&T's challenges to that precedent. AT&T argued that: (a) *Pallas* was wrongly decided, and should have followed *Evans* instead of *Bazemore;* (b) *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), demonstrates that *Pallas* was wrongly decided; and (c) intervening decisions by this Court and the Supreme Court implicitly overruled *Pallas* because it granted the PDA impermissible retroactive effect. *Id.* at 9-17.

Although the court described AT&T's contentions as "interesting and compelling," it rejected them. A district court, the court pointed out, is not free to overrule a decision of its own court of appeals, or to follow a decision from another circuit that disagrees with one from its own. *Id.* The court also rejected AT&T's reliance on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Lockheed Corporation v. Spink*, 517 U.S. 882 (1996). The court ruled that these decisions were not "sufficiently on point to justify setting aside the clear holding of *Pallas.*" *Id.*

ARGUMENT

THIS COURT'S HOLDING IN *PALLAS* — THAT AN EMPLOYER VIOLATES TITLE VII WHEN IT CHOOSES TO CONTINUE RELYING ON A SENIORITY SYSTEM THAT FACIALLY DISCRIMINATES ON THE BASIS OF PREGNANCY IN CREDITING PAST SERVICE — IS STILL GOOD LAW.

The district court held that, under this Court's decision in *Pallas*, the plaintiffs are entitled to summary judgment on their claims that AT&T violates Title VII when it uses its NCS system to determine their retirement benefits. In this appeal AT&T does

not challenge the district court's conclusion that the plaintiffs should prevail under *Pallas*. Instead they argue that *Pallas* is no longer good law. Under the law of this circuit, this panel is bound by *Pallas* unless it has been overruled, either explicitly or implicitly, by a subsequent decision of the Supreme Court or the Ninth Circuit sitting en banc. *U.S. v. Hinostroza*, 297 F.3d 924, 927 (9th Cir. 2002) ("[O]nly the court sitting en banc may overrule a prior decision of the court."); *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) ("[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled."). AT&T's arguments that this panel is not bound by *Pallas* under this standard are unavailing.

In *Pallas*, the district court had dismissed the plaintiffs' Title VII claims challenging Pacific Bell's decision to use the same NCS system at issue in this case to determine the plaintiffs' eligibility in 1987 for an early retirement program, and this Court reversed. The facts of *Pallas* are very similar to the facts of this case. Pallas began working for Pacific Bell in 1967 and went out on pregnancy leave in 1972. Under the NCS system she was credited with only 30 days of service for that pregnancy leave, even though employees suffering non-pregnancy-related disabilities received service credit for as long as they were disabled. The company announced an early retirement program in 1987, and Pallas applied for it. The company rejected her application because, due to the abbreviated service credit she had received for the pregnancy leave she took in 1972, she was a few

days short of the credit she needed to qualify for the program. *Pallas*, 940 F.2d at 1326.

In dismissing Pallas's Title VII claim, the district court had relied on *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) and *United Air Lines. Inc. v. Evans*, 431 U.S. 553 (1977), to hold that the NCS system was a seniority system protected by § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), and that Pallas's Title VII challenge to that system was therefore not timely. *Pallas*, 940 F.2d at 1326. This Court reversed. It gave two reasons why *Lorance* and *Evans* did not govern Pallas's claim. First, Pallas was challenging not the actions the company took in 1972, when Pallas took her pregnancy leave, but the decision the company made in 1987. *Id.* at 1327 (". . . Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy."). Second, the NCS system was not protected by § 703(h) because it "is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women." *Id.*

Since the NCS system was facially discriminatory, the *Pallas* court reasoned, the governing authority was not *Lorance* or *Evans*, but *Bazemore v. Friday*, 478 U.S. 385 (1986). The employers in *Bazemore* had maintained a racially segregated workforce before 1965, and had paid African American employees less than white employees performing the same duties. Starting in 1965, the employers desegregated their workforce and started adjusting the black employees' salaries, but in 1972, when they became subject to Title VII, the employers were still paying black workers less than comparable white workers, at least in part because of the prior segregation. The Fourth Circuit, relying in part on § 703(h) and *Evans*, held that these post-1972 disparate wages did not violate

Title VII. The Supreme Court reversed, holding that the employers violated Title VII by continuing to pay black workers less than white workers after the employers became subject to Title VII. *Bazemore*, 478 U.S. at 395. The fact that the current disparity may be attributable to past discrimination that was lawful at the time, the Court held, does not provide the employer with a defense for its current pay practices. *Id.* This Court held in *Pallas* that just as the employers in *Bazemore* could not lawfully continue to pay black workers less than white workers after they became subject to Title VII, so Pacific Bell could not lawfully continue, long after it became subject to the PDA, to rely on a service-crediting system that openly discriminates on the basis of pregnancy. *Pallas*, 940 F.2d at 1327.

AT&T argues that *Pallas* is no longer good law for three reasons: (a) it was implicitly overruled by intervening Supreme Court decisions addressing the retroactive application of statutes; (b) it was implicitly overruled by *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), which overruled one aspect of this Court's continuing-violation doctrine; and (c) it was bad law when decided because it failed to address the discussion of § 703(h)'s protection for seniority systems in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). As we explain below, none of these arguments provides a basis for this panel not to follow *Pallas*.

A. *Pallas was not Implicitly Overruled by Subsequent Supreme Court Decisions Regarding the Retroactive Application of Statutes.*

AT&T argues that *Pallas* has been implicitly overruled by *Landgraf v. USI Film Products*, 511 U.S.

244 (1994), and *Lockheed Corporation v. Spink*, 517 U.S. 882 (1996). According to AT&T, under those decisions it is clear that this Court's decision in *Pallas* constituted an impermissible retroactive application of the PDA to conduct which occurred before that statute took effect. However, as we explain, this Court's reasoning in *Pallas* is not inconsistent with either *Landgraf* or *Lockheed*. They therefore provide no basis for overruling *Pallas* or reversing the district court's decision.

Landgraf addressed whether the provisions of the Civil Rights Act of 1991 that made employers liable for compensatory and punitive damages should be applied in cases challenging violations that occurred before the act took effect. The Supreme Court held they should not. The Court ruled that Congress had not clearly stated an intent to apply the new damages provisions retroactively, and that courts should therefore apply the presumption against retroactive application of any statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. AT&T contends that *Pallas* violated these principles by imposing new liability on Pacific Bell based on service-crediting decisions that were made before the effective date of the PDA, when they were lawful.

Landgraf, however, is fundamentally different from this case in that the plaintiff in *Landgraf* was asking the court to apply a new remedy to an act that was completed before the remedy was made available. By contrast, Pallas was not asking the courts to increase her employer's liability for events that were completed before 1979: e.g., by compensating her for lost

compensation during her 1972 pregnancy leave, or for employment opportunities she lost before 1979 due to the diminished job-bidding seniority she had during that period. Rather, Pallas was asking the courts to impose liability on her employer for a decision it made in 1987. She was challenging Pacific Bell's decision in 1987 to continue relying on a system that discriminates on the basis of pregnancy. Accordingly, *Landgraf* does not call into question this Court's decision in *Pallas*.

Similarly, in *Lockheed*, the plaintiffs were seeking full relief for actions that were made unlawful only after they were completed. Lockheed hired Spink in 1979, when he was over 60 years old, and excluded him from its pension plan because of his age. ERISA then expressly allowed such age-based exclusions. In 1986 Congress amended ERISA to prohibit excluding employees from retirement programs on the basis of their age, and Lockheed accordingly enrolled Spink in its pension plan prospectively, starting at the end of 1988.

In early 1992 Spink sued Lockheed, claiming that it had violated ERISA and the ADEA by failing to treat him as if he had been included in the company's pension plan starting in 1979, when he was hired. This Court ruled for Spink, concluding that the 1986 amendments required this "retroactive" application. *Spink v. Lockheed Corp.*, 60 F.3d 616, 620-22 & n.1 (9th Cir. 1995). The Supreme Court reversed, pointing out that the 1986 amendments themselves stated that they applied only to pension plan years starting after the amendments took effect. *Lockheed* 517 U.S. at 896-97.

AT&T contends that the facts in *Pallas* (and this case) are "in all relevant respects identical" to

Lockheed, and that the relief granted in *Pallas* accordingly constitutes impermissible retroactive relief under *Lockheed*. Br. at 34. But *Lockheed* differs from *Pallas* in a critical respect. Spink asked his employer for complete retroactive relief: he wanted Lockheed to adjust his pension-plan status (and make the required back contributions) as if the 1986 amendments had actually gone into effect before he started working for Lockheed in 1979. Pallas (like the plaintiffs in this case) was not asking her employer to treat her as if the PDA had been enacted before her 1972 pregnancy leave. She was not asking, for example, for the salary she would have received during her pregnancy, or for back pay for positions she was denied due to her lower seniority. Rather, she was asking Pacific Bell not to discriminate on the basis of pregnancy in the decisions it made in 1987.

AT&T relies on *Landgraf* and *Lockheed* to argue that a statute has an impermissible retroactive effect whenever an entity subject to the statute is required, in making present decisions, to recalculate the effect of lawful actions taken before the statute was in effect. The company's position cannot be reconciled with *Regions Hospital v. Shalala*, 522 U.S. 448 (1998), which was decided after *Landgraf* and *Lockheed*. In that case, the Supreme Court held that a regulation was not retroactive despite the fact that it required the re-auditing of a hospital's reimbursable costs for a past year in order to establish its reimbursement for future years. The regulation at issue was promulgated by the Secretary of Health and Human Services in 1989 and required a re-audit of a hospital's reimbursable costs for medical education during 1984 before using that figure to determine the hospital's reimbursement for future years. The hospital sued the Secretary, arguing that her regulation was giving

the 1986 statute impermissible retroactive effect in violation of *Landgraf* because it allowed the Secretary to re-audit the reimbursable costs that the hospital had incurred in 1984, before the regulation went into effect.

The Supreme Court rejected this argument, quoting a passage from *Landgraf* stating that a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." *Regions Hosp.*, 522 U.S. at 456 (quoting *Landgraf*, 511 U.S. at 270 n.24) (citation and punctuation omitted). The Court noted that the Secretary was not recalculating the hospital's 1984 costs in order to change retroactively the amount the hospital would be reimbursed for that year. Rather, the Secretary was recalculating the hospital's 1984 costs in order to determine the reimbursable costs for years to which the 1986 amendment clearly prospectively applied. *Id.* at 456 ("[T]he Secretary's reaudits leave undisturbed the actual 1984 reimbursements and reimbursements for any later cost-reporting year on which the three-year reopening window had closed. The adjusted reasonable cost figures resulting from the reaudits are to be used solely to calculate reimbursements for still open and future years.").[1]

---

[1] The *Regions Hospital* Court also relied on the fact that the re-audits that the Secretary required were not applying a new set of rules to the 1984 reimbursement, but were instead applying the rules that applied to the original audit, albeit after the time limit for reopening the reimbursement had expired. 522 U.S. at 456. The PDA was not in effect at the time the plaintiff in *Pallas* took her pregnancy leaves. However, this makes no difference. The Supreme Court stated in *Evans* that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." 431 U.S. at 558.

Similarly here, as in *Pallas*, consideration of AT&T's former policy regarding pregnancy leaves is not being used to obtain relief for, or alter the legal effect of, actions taken pursuant to that policy in the past. Rather, that policy is at issue only insofar as it relates to the legality of current actions. Accordingly, *Pallas* does not sanction an impermissibly retroactive application of the PDA. *Pallas* correctly held that the plaintiffs claim was governed by *Bazemore*. The employers in *Bazemore*, once they became subject to Title VII, were no longer allowed to base their current and prospective salary decisions in part on the disparate salaries that whites and blacks had (lawfully) been paid before 1972. Therefore, this Court correctly held in *Pallas* that Pacific Bell, once it became subject to the PDA in 1979, was no longer allowed to base its current and prospective decisions about the level of benefits it would award new retirees in part on the disparate service credit it had accorded female employees who took pregnancy leave before 1979.

B. *Pallas was not Implicitly Overruled by the Supreme Court's Decision in Morgan Regarding the Limitations Period for Challenging Discrete Acts of Discrimination under Title VII.*

AT&T also argues that *Pallas* was implicitly overruled by *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002). The company contends that *Pallas* relied on the continuing-violation doctrine, and that *Morgan* rejected the aspect of the continuing-violation doctrine on which *Pallas* relied.

Accordingly, Pacific Bell's pre-PDA decision to deny Pallas full credit for her pregnancy leave is legally equivalent to a 1 similar decision made after the PDA was in effect but which was not timely challenged, like the reimbursements in *Regions Hospital*.

The argument is meritless. *Pallas* did not rely on the continuing-violation doctrine at all, and certainly not on the aspect of that doctrine that *Morgan* rejected. *Pallas* used the term "continuing violation" only once, in discussing the holdings of *Lorance* and *Evans*, but it held that the district court had erred in following those cases. *Pallas*, 940 F.2d at 1326-27.

In *Morgan*, the Supreme Court rejected this Court's holding that, under the "continuing violation" theory, the plaintiff could seek relief for discrete acts of discrimination which occurred outside Title VII's 300-day limitations period for filing a charge as long as those violations were sufficiently related to violations that took place within that period. The Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Morgan*, 536 U.S. at 113. This holding in *Morgan* is not relevant to the continuing vitality of *Pallas*. Pallas was not challenging a series of discrete discriminatory actions, some occurring outside and some inside the 300-day period, and the *Pallas* Court did not rely on the theory of continuing violations. Rather, it held that Pallas's claim was timely because she was challenging a discriminatory action that her employer took in 1987, less than 300 days before she filed her charge. *Pallas*, 940 F.2d at 1327 ("Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy.").

It is true that the *Morgan* decision discusses *Evans* and *Delaware State College v. Ricks*, 449 U.S. 250 (1980). *Morgan*, 536 U.S. at 112-13. It also summarizes the holding in *Bazemore*. *Id.* at 111-12. But *Morgan* does not purport to alter the holdings of these earlier cases, and summarizes them only as

background for the principles it derives from them. Under those principles a plaintiff may not seek relief for a "discrete discriminatory act" that occurred outside the 180- or 300-day period. *Id.* at 113. On the other hand, even though an employee cannot seek relief for time-barred acts, she may seek relief for "related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." *Id.* As this Court recognized, Pallas was seeking relief for a decision that Pacific Bell made in 1987 that discriminated against her on the basis of pregnancy, and her claim was therefore timely. Thus nothing in *Morgan* changes the holdings in *Bazemore* or *Evans*, and nothing in *Morgan* casts doubt on this Court's decision that Pallas's claim should be governed by *Bazemore* instead of *Evans*.[2]

AT&T cites four decisions for the proposition that *Morgan* "effected fundamental changes to the statute of limitations law surrounding Title VII claims," and that "[p]revious continuing violation law must be reexamined in light of the Supreme Court's recently imposed limits on the viability of the doctrine' in Morgan." Br. at 39, 43 (internal quotations omitted) (citing *Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 F.3d 1185 (9th Cir. 2003); *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002); *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003); and *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003)). However,

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[2] This Court's decision that Pallas's claim should be governed by *Bazemore* and not *Evans* in turn depended on the *Pallas* Court's determination that insofar as the NCS system constituted a seniority system potentially protected by § 703(h), the system was facially discriminatory. 940 F.2d at 1326-27. We address this issue in more detail *infra*, at 21-26.

none of the cited decisions are relevant to the *Pallas* Court's decision that this case is a challenge to a present discriminatory act controlled by *Bazemore*, and not an attempt to recover for the present effects of a time-barred past act under *Evans*. Rather, they cite *Morgan* solely for its rejection of the principle that a time-barred discrete act may be challenged if it is sufficiently related to acts occurring within the limitations period, a holding that, as we have demonstrated *supra*, is not relevant to the continuing vitality of *Pallas*. Indeed, this Court in *Lyons* went out of its way to point out that *Morgan's* rejection of the "serial violation" rule

> does not mean that claims based on discriminatory policies initiated outside the limitations period will be foreclosed. . . . Following *Morgan*, when a plaintiff alleges a systematic violation, each individual act of discrimination occurring within the limitations period may form the basis of an actionable claim, even if the discriminatory policy was initiated outside the limitations period.

Lyons, 307 F.3d at 1107 n.7.

The only case that AT&T cites in this section of its brief that contains a discussion relevant to *Pallas's* choice between *Bazemore* and *Evans* is *Carter v. West Publishing Company*, 225 F.3d 1258 (11th Cir. 2000), but that decision was issued before *Morgan*, and, therefore, cannot be applying any new principles announced in that case. Furthermore, *Carter* is fully consistent with *Pallas*. *Carter* addressed a claim by female employees that their employer had, up until August 1994, discriminated against them by not allowing them to purchase the company's stock, or by not allowing them to purchase as much stock as

comparable male employees were allowed to purchase. The earliest charge filed with the EEOC challenging this policy was filed more than 300 days after West last sold any stock to its employees. The court of appeals rejected plaintiffs' argument that the charge was timely under the continuing violation doctrine because West continued to pay dividends on the stock the employees owned up until June 1996, when another company purchased West. *Carter*, 225 F.3d at 1260-61, 1263. The court held that West's payment of dividends was not itself a discriminatory act, but was instead merely an "inevitable consequence" of the earlier, time-barred, allegedly discriminatory practice of selling its stock to its male employees more liberally than to its female employees. *Id.* at 1265. The court accordingly held that the timeliness of Jones's claim was governed by *Evans* and *Ricks*, and not *Bazemore*. *Id.* at 1263-65 (analogizing West's dividend payments to the college's policy in *Ricks* of allowing its faculty members to work one additional year after it denied them tenure, and to the impact that the airline's neutral seniority system had on Evans).

The facts of *Pallas* are quite different. In *Pallas* the employer had made a decision in 1987 that was not an "inevitable consequence" of the decision it had made earlier in 1972 (with respect to Pallas's pregnancy leave): it decided to continue relying in 1987 on a service-crediting system that openly discrimination on the basis of pregnancy. If West paid dividends in 1995, it was legally bound to pay dividends to all its stockholders. Pacific Bell, however, was not legally bound to continue basing its current retirement, decisions on the openly discriminatory service-crediting system. Indeed, the PDA prohibited it from doing so.

C. *The Pallas Court's Failure to Cite the Supreme Court's Decision in Teamsters does not Provide a Ground for this Panel to Fail to Follow it.*

Finally, AT&T argues that *Pallas* was bad law when it was decided because the decision failed to address *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), which AT&T describes as "the leading case construing Title VII's specially-tailored seniority provision, Section 703(h)." Initially, we note, AT&T cites no intervening decision of the Supreme Court in support of its contention that *Pallas* misconstrued § 703(h). Accordingly, even if the company's analysis were correct, it would establish only that *Pallas* was wrongly decided, not that it is not binding precedent in this circuit. However, AT&T's argument fails on the merits; *Pallas* correctly applied § 703(h) to the facts of that case, which are indistinguishable from the facts of this case.

In *Teamsters*, the Supreme Court held that under § 703(h), "the routine application of a bona fide seniority system [is not] unlawful under Title VII, . . . even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes," with the consequence that the neutral seniority system "perpetuates" pre-Act discrimination. *Id.* at 352. The Court stressed, however, that § 703(h)

> does not immunize all seniority systems. It refers only to "bona fide" systems, and a proviso requires that any differences in treatment not be "the result of an intention to discriminate because of race . . . or national origin

Id. at 353. It is true that this Court's decision in *Pallas* does not cite to *Teamsters*. However, contrary

to AT&T's argument, that does not relieve this panel of its obligation to follow *Pallas*.

First, it is clear — and AT&T does not maintain otherwise — that *Pallas* did not ignore the § 703(h) issue that AT&T is so concerned about. Indeed, the principal holding in *Pallas* addressed the application of § 703(h)'s protection for bona fide seniority systems to the facts before it. The district court had held that the NCS system on which Pacific Bell relied was a bona fide seniority system, and that Pallas's challenge was therefore untimely under *Lorance* and *Evans*. *Pallas*, 940 F.2d at 1326. This Court reversed, and spelled out two reasons why the district court had erred. One, Pallas was challenging a decision that Pacific Bell made in 1987, not one it made in 1972, when Pallas went out on pregnancy leave. *Id.* at 1327. Two, the NCS system was not protected by §703(h) because it was not a bona fide, facially neutral system. On the contrary, it applied rules that discriminated on their face on the basis of pregnancy. *Id.* ("The system . . . facially discriminates against pregnant women.").

Second, and more important, the manner in which *Pallas* distinguished *Lorance* and *Evans* demonstrates that the *Pallas* court would have distinguished *Teamsters* on the same ground. *Lorance*, *Evans*, and *Teamsters* all dealt with seniority systems that were facially neutral: the seniority system in *Lorance* was based on seniority in a particular position (seniority as a tester) and contained no provision relating to gender; the controlling seniority provision in *Evans* related to breaks in service and said nothing about gender; and the relevant provision in *Teamsters* mandated bargaining-unit seniority and was silent with respect to race and national origin.

Pallas, on the other hand, addressed an NCS system whose service-crediting rules expressly discriminated between pregnancy-based disability and other types of disabilities. 940 F.2d at 1327 ("The system used to determine eligibility facially discriminates against pregnant women."). Had *Pallas* mentioned *Teamsters*, it would therefore have distinguished it on the same ground as *Lorance* and *Evans*. Its failure to discuss *Teamsters* specifically therefore does not detract in the slightest from the validity of its holding.

AT&T argues that a proper application of *Teamsters* would have prevented the *Pallas* Court from relying on either of the reasons it gave for distinguishing *Evans* and *Lorance*. *Pallas* ruled that Pacific Bell's NCS system was not bona fide because it discriminated on its face on the basis of pregnancy, and "thereby. 'perpetuate[s]' prior acts of discrimination." Br. at 47 (quoting *Pallas*, 940 F.2d at 1327). It is true that *Pallas* used the word "perpetuate" in describing the NCS system, but it used the same word in describing the holding in *Bazemore*, and therefore clearly was not using the word solely in the sense that *Teamsters* used it. In any event, *Teamsters* did not hold that § 703(h) protects any seniority system that perpetuates the effects of past discrimination. It held that § 703(h) protects bona fide, facially neutral seniority systems, and does not render them unlawful merely because they perpetuate the effects of time-barred (or otherwise lawful) discrimination. Here, and in *Pallas*, §703(h) as interpreted by *Teamsters* does not protect the NCS system, because the system itself discriminates on the basis of pregnancy.[3]

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[3] AT&T apparently is not arguing that the portions of the NCS system that continue to treat women who took pregnancy

Second, *Pallas* ruled that *Evans* and *Lorance* did not govern the timeliness of Pallas's claim because she was challenging decisions that Pacific Bell made in 1987, and her charge was therefore timely. AT&T contends that *Teamsters* disallows this rationale, too. *Teamsters*, AT&T maintains, "made clear that Section 703(h) applies not only to seniority systems, but also to independent, post-Act employment and benefit decisions *based on* such systems." Br. at 48-49. Again, AT&T fails to distinguish between seniority systems that are facially neutral, as in *Teamsters*, and those that on their face continue to discriminate on a prohibited basis, as the NCS system does.

In sum, *Pallas* correctly ruled that the NCS system, insofar as it constitutes a seniority system, discriminates on its face on the basis of pregnancy, and is therefore not a bona fide seniority system entitled to protection under § 703(h). AT&T cites no Supreme Court case decided after *Pallas* that casts doubt on this aspect of the *Pallas* decision. Accordingly, this Court must follow *Pallas* and affirm the district court's ruling that AT&T violates Title VII when it chooses to base its current decisions regarding benefits on NCS rules that continue to treat plaintiffs' pre-1979 pregnancy leaves less favorably than their co-workers' pre-1979 non-pregnancy-related disabilities. *See EEOC Compliance Manual*, ch. 3, "Employee Benefits," Title VII/EPA Issues,

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leave before 1979 differently from employees who had other types of disabilities during that period are not a part of the NCS system on which AT&T continues to rely. Any such argument should be rejected. *See California Brewers Ass'n v. Bryant*, 444 U.S. 598, 607 (1980) (the "ancillary rules . . . that define which passages of time will 'count' towards the accrual of seniority and which will not" are an integral part of a seniority system).

III.B (issued Oct. 3, 2000) (discussing an example whose facts parallel those in *Pallas* and concluding: "While the denial of service credit to women on maternity leave was not unlawful when [the charging party] took her leave in [1975], the employer's decision to incorporate that denial of service credit in calculating seniority in 1996 is discriminatory.") (available at <http://www.eeoc.gov/policy/docs/benefits.html>).

CONCLUSION

For the reasons stated above, the Commission urges this Court to affirm the decision of the district court.

Respectfully submitted,

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PETITIONER'S BRIEF

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IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

Before the passage of the Pregnancy Discrimination Act of 1978 (PDA), it was lawful to award less service credit for pregnancy leaves than for other temporary disability leaves. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125 (1976). Accordingly, the questions presented are

1. Whether an employer engages in a current violation of Title VII when, in making post-PDA eligibility determinations for pension and other benefits, the employer fails to restore service credit that female employees lost when they took pregnancy leaves under lawful pre-PDA leave policies.

2. Whether the Ninth Circuit's finding of a current violation of Title VII in such circumstances gives impermissible retroactive effect to the PDA.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

AT&T Corporation ("AT&T") is a wholly owned subsidiary of AT&T Inc., a publicly traded company. No entity owns more than 10% of AT&T Inc. stock.

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OPINIONS BELOW

The order of the United States District Court for the Northern District of California granting summary judgment against petitioner AT&T Corporation ("AT&T"), is unreported, and is reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") 98a-128a. The initial decision of the Ninth Circuit is reported at 441 F.3d 653 (9th Cir. 2006), and reproduced at Pet. App. 64a-97a. The Ninth Circuit granted rehearing en banc in an order reported at 455 F.3d 973 (9th Cir. 2006), and reproduced at Pet. App. 129a. The en banc decision of the Ninth Circuit—which is the judgment under review here—is published at 498 F.3d 1001 (9th Cir. 2007), and reproduced at Pet. App. 1a-63a.

JURISDICTION

The court of appeals, sitting en banc, entered judgment on August 17, 2007, Pet. App. 1a. AT&T filed a petition for certiorari on October 22, 2007, and this Court granted the petition on June 23, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)), and other relevant statutes are reproduced in the statutory addendum to this brief.

STATEMENT OF THE CASE

In the decision below, an en banc panel of the Ninth Circuit held that AT&T violated Title VII when, in calculating the pension benefits of retiring female

employees between 1994 and 2000, AT&T relied on service credit, or seniority, decisions that it had made decades earlier—and that were entirely lawful when made. Prior to the Pregnancy Discrimination Act of 1978 ("PDA"), AT&T treated pregnancy leave as personal leave, and therefore awarded less than full service credit, or seniority, for time spent on such leaves. At the time, this conduct was lawful. See *General Elec. Co.* v. *Gilbert*, 429 U.S. 125 (1976). When the PDA took effect, AT&T changed its leave policies to award the same service credit for pregnancy leaves that it awarded for temporary disability leaves. But, because the PDA did not apply retroactively, AT&T did not re-calculate the service credit of women who had taken pre-PDA pregnancy leaves. When these women retired decades later, AT&T calculated their pension benefits in accordance with the seniority they had earned over the course of their careers, including the less than full service credit earned under AT&T's then-lawful pre-PDA leave policies.

The Ninth Circuit's conclusion that AT&T engaged in current violations of Title VII by relying on decades-old service credit awards is plainly wrong, and conflicts with the well-settled precedent of this Court. First, by holding AT&T liable because it relied on pre-PDA lawful denials of service credits, the decision below necessarily gave the PDA impermissible retroactive effect. Second, even if AT&T's earlier service credit awards are now deemed to have been unlawful, the limitations period for challenging these decades-old decisions expired long ago, and this Court has repeatedly held that Title VII is not violated anew whenever an employer gives present effect to no-longer actionable acts of discrimination. Third, § 703(h) of Title VII codifies this very principle where, as here, past acts of discrimination are given present

effect through an otherwise lawful seniority system. None of the reasons cited by respondents or the en banc majority below justifies the Ninth Circuit's refusal to follow these dispositive principles.

A. Statutory Background

Since 1964, Title VII has forbidden discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1). In 1976, however, this Court held that the exclusion of pregnancy from a general disabilities plan did *not* constitute sex discrimination under Title VII. *Gilbert*, 429 U.S. at 125. Congress responded to *Gilbert* by enacting the PDA, which amended Title VII's definition of "because of sex" and "on the basis of sex" to include discrimination based on pregnancy-related conditions. See 42 U.S.C. § 2000e(k).

Although the law took effect on the date of its enactment (October 31, 1978), Congress expressly provided employers an additional 180 days (until April 29, 1979) to modify pre-existing benefits policies to treat pregnancy leaves the same as other forms of temporary disability. See PDA, § 2(b), 92 Stat. at 2076 (PDA does not apply to "any fringe benefit program or fund . . . which is in effect on the date of enactment of this Act until 180 days after enactment of this Act."); see also *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 671 n.2 (1983).

Additionally, Title VII contains two provisions relevant to seniority systems. First, § 703(h), codified at 42 U.S.C. § 2000e-2(h), provides that a discriminatory effect stemming from a "bona fide" seniority system is not an unlawful employment practice. This exception does not apply to facially discriminatory seniority systems, or to facially neutral systems that were adopted for an intentionally discriminatory purpose. Second, § 706(e)(2), which was enacted in 1991, pro-

vides that, in the case of seniority systems that are either facially discriminatory or facially neutral but adopted for an intentionally discriminatory purpose, an employee may sue when the seniority system is adopted, when the employee becomes subject to the system, or when he or she is injured by the application of that system. Pub. L. No. 102-166, sec. 112(2), § 706(e)(2), 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 2000e-5(e)(2)) (hereinafter, § 706(e)(2)).

B. Factual Background

AT&T's nearly century-old seniority system, known as the Net Credited Service ("NCS") system, has long been used by members of the former Bell System—both before and after its break-up in 1984—to quantify each employee's seniority, or term of employment. JA 38-40 (¶¶ 17, 21). Under the NCS system, an employee's first day on the job becomes her NCS date. The earlier the date, the better positioned the employee is for service-related determinations, such as competitive job bidding, shift preference, lay-off determinations, vacation time, and retirement benefits. *Id.* at 39. (¶¶ 18-19).

To reflect an employee's period of service accurately, however, it is sometimes necessary to adjust an initial NCS date. For example, two employees who both started work on July 1, 1975, should not be treated the same for seniority purposes if one of them took a personal leave of absence for six months in 1977 and the other never took any leave. To address this type of situation, the NCS date is moved forward to reflect any periods of leave or other absences for which less than full service credit is given. JA 38-40 (¶¶ 17, 18, 21). In the above hypothetical, the first employee's NCS date would remain July 1, 1975. The second employee's NCS date would be advanced in

time to reflect the period of time spent on uncredited personal leave.

After divestiture, AT&T continued to use the NCS system for its own pre-divestiture employees and for employees of the former Bell System (such as Pacific Telephone and Telegraph ("PT&T")) who transferred to AT&T after divestiture.[1] During the intervening two decades, countless daily personnel decisions were made in reliance on the NCS system, for both management and hourly employees.[2]

Before the PDA's effective date in 1979, AT&T classified pregnancy leaves as personal leaves, not as disability leaves. This distinction was significant because NCS adjustments were handled differently for these categories of leave. For personal leaves, employees were paid, and received service credit, for only the first 30 days of leave. For disability leaves, employees received service credit for the entire period of their paid disability leave. JA 47-52 (¶¶ 66, 68, 71-78, 81-83, 85-86). Thus, an employee who took three months of personal leave would have her NCS date moved forward 60 days (90 – 30), while an employee who took three months of disability leave would have an unchanged NCS date.[3]

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[1] Respondents were originally employed by PT&T and transferred to AT&T after divestiture.

[2] For hourly employees, this is a matter of contract: collective bargaining agreements between AT&T and respondent Communications Workers of America ("CWA") have consistently provided that benefits and the competitive allocation of job rights are based on NCS dates. JA 39-40 (¶¶ 19-20).

[3] Between August 7, 1977 and the date the PDA took effect, AT&T increased the service credit for pregnancy leave to 30 days before delivery and six weeks after delivery. JA 48 (¶ 70). After six weeks, the leave became personal leave. *Id.*

On April 29, 1979 (the effective date of the PDA), AT&T began providing service credit for pregnancy leaves on the same basis as leave taken for temporary disabilities. JA 50 (¶ 79). AT&T did not, however, retroactively adjust the service credit awards of women who had previously taken maternity leaves. *Id.*

Each of the respondent employees took pregnancy leaves between 1968 and 1976. JA 40-46 (¶¶25-62). Each received less than full service credit for these leaves because, under AT&T's policies, these leaves were treated as personal leaves. *Id.* Accordingly, AT&T adjusted the NCS date of each upon her return from pregnancy leave. *Id.* Each employee "maintained" her adjusted NCS date following her transfer from PT&T and "was aware that her NCS date traveled with her from PT&T to AT&T." *Id.* at 41, 43, 44, 45 (¶¶ 29, 40, 51, 60). Moreover, "[t]hroughout her employment with PT&T and AT&T, [each] periodically received documents that contained her [adjusted] NCS date." *Id.* at 43, 44-46 (¶¶ 39-42, 50-53, 59-61).

Three of the four individual respondents retired from AT&T between 1994 and 2000.[4] In determining their pension benefits, AT&T "use[d] the NCS date previously computed for leave taken before" the PDA's effective date. JA 75.[5] As a result, the term of

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[4] Respondent Linda Porter is a current AT&T employee.

[5] AT&T is permitted to adjust an employee's NCS date when "the date has been calculated incorrectly" or "the change is necessary to comply with legal requirements." JA 56 (¶ 104). Accordingly, AT&T adjusted the NCS date of respondent Elizabeth Snyder because she was not given the 30- days service credit she had been entitled to under the policy at the time of her pregnancy leave. *Id.* at 46 (¶ 63).

employment used to calculate the pension benefits for these three respondents was not as long as it would have been had they received full service credit for their pre-PDA leaves. For example, when respondent Hulteen retired in 1994, she had "210 days of uncredited pregnancy leave that resulted in reduced pension benefits." Pet. App. 5a.

C. The District Court's Decision

Claiming that their benefits were calculated unlawfully, the respondent employees, joined by the CWA, filed suit in the United States District Court of the Northern District of California. Based on stipulated facts, the parties filed cross-motions for summary judgment. Respondents chiefly relied on a prior Ninth Circuit decision, *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), which held that an identical NCS system calculation violated the PDA. *Pallas* had reasoned that Pacific Bell's reliance in 1987 on Pallas's previously-adjusted NCS date to determine eligibility for retirement benefits perpetuated earlier discrimination and thereby rendered the NCS system "facially discriminatory."

AT&T argued that *Pallas* was no longer controlling law because intervening decisions of this Court, including *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), demonstrated that *Pallas* had given the PDA an impermissible retroactive effect. Although noting that AT&T's arguments had "great logical and legal force," Pet. App. 121a, the district court concluded it was bound by *Pallas*. It therefore granted respondents' motion for summary judgment, *id.* at 123a, 128a, but certified the issue of liability under the PDA for interlocutory appeal. JA 21.

D. The Initial Panel Opinion

On appeal, the court of appeals agreed with AT&T, holding that *Pallas* was no longer controlling law in light of, *inter alia*, *Landgraf*. The panel reasoned that:

> [t]he failure to award employees full service credit for their pregnancy leaves could be labeled facially discriminatory only if employees [who took pre-PDA pregnancy leaves and employees who took paid disability leaves before the PDA] were similarly situated, e.g., if all were legally entitled to receive full credit for their leaves before the enactment of the PDA. But that would be true only if the PDA were given impermissible retroactive effect.

Pet. App. 80a. Judge Rymer dissented solely because she did not believe that *Pallas* was "clearly irreconcilable" with intervening authority. *Id.* at 88a.

E. The En Banc Decision

A divided en banc panel reaffirmed *Pallas*'s holding that post-enactment reliance on pre-PDA service credit calculations violates Title VII.

In so ruling, the majority rejected AT&T's argument that *Pallas* was wrongly decided as an initial matter in light of *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), which held that a new Title VII violation does not occur when a "seniority system gives present effect to [a time-barred] past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557. The majority below, however, accepted *Pallas*'s conclusion that the NCS system is "facially discriminatory," and thus distinguished *Evans*—as well as this Court's then-recent decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*,

127 S. Ct. 2162 (2007)—on the ground that both of these cases involved facially neutral seniority systems. Pet. App. 9a-10a. The majority concluded that this case was controlled instead by *Bazemore* v. *Friday*, 478 U.S. 385 (1986) (per curiam), where this Court held that an employer's decision to continue paying black workers less than similarly situated white workers after the employer became subject to Title VII constituted a new violation of Title VII. *Id.* at 395 (Brennan, J., joined by all other Members of the Court, concurring in part).

The majority also rejected AT&T's argument that *Pallas* had given the PDA retroactive effect. The majority reasoned that "[o]nly one Supreme Court decision cast doubt on whether Title VII prohibited employers from discriminating on the basis of pregnancy," and that the "PDA therefore did not alter Hulteen's or AT&T's rights or liabilities under Title VII, but corrected *Gilbert*'s erroneous interpretation of Title VII." Pet. App. 11a n.6.

Judge O'Scannlain, joined by Judges Rymer, Bybee, and Callahan, dissented. The dissent explained that, by characterizing respondents' claim as a current violation of Title VII, the majority contravened *Evans* and *Ledbetter*, which hold that "'current effects alone cannot breathe life into prior, uncharged discrimination.'" Pet. App. 43a (quoting *Ledbetter*, 127 S. Ct. at 2169). *Evans* and *Ledbetter* could not be avoided by labeling the NCS system "facially discriminatory," the dissent explained, because eligibility and benefits are determined based on NCS dates, which are facially neutral. *Id.* at 44a. The majority's conclusion that the NCS system treats "similarly situated" employees differently "necessarily depends on a retroactive application of the PDA." *Id.* at 45a. Women who took pre-PDA pregnancy leaves were not "similarly

situated" to workers who took leaves prior to 1979 for other reasons because, under AT&T's then lawful policies, those women were not entitled to the same full service credit for those leaves. *Id.* at 45a-46a.

Absent the false premise of "facial discrimination," the dissent explained, this case was indistinguishable from *Evans*. "Because of the past acts of discrimination, Evans and Hulteen had less seniority, and, not surprisingly, the determinations of their benefits . . . were adversely affected." Pet. App. 49a (footnote omitted). Unlike the situation in *Bazemore*, moreover, AT&T did not simply continue a pre-enactment practice (granting less than full service credit for pregnancy leaves) after Congress had outlawed that practice; instead, AT&T had failed to remedy pre-enactment discrimination, which *Bazemore* expressly held was not required. *Id.* at 51a-53a.

SUMMARY OF ARGUMENT

1. Just weeks before the Ninth Circuit issued its divided *en banc* ruling, this Court re-affirmed the principle, first announced three decades ago in *Evans*, that a new violation of Title VII does not occur when an employer gives present effect to a past act of unlawful discrimination. *Ledbetter*, 127 S. Ct. at 2167-70. While this principle mandates reversal of the judgment below, respondents' claims are foreclosed for a more basic reason. The NCS system does not give present effect to actions that were *unlawful* at all, because AT&T's pre-PDA service credit denials were legal when made. Accordingly, the majority's determination that AT&T's reliance on these lawful decisions violates Title VII necessarily rests on impermissible retroactive application of the PDA.

Prior to the PDA, this Court held that excluding pregnancy from a general disability benefits plan is "not a gender-based discrimination at all" under Title VII. *Gilbert*, 429 U.S. at 136. In light of *Gilbert*, the Ninth Circuit itself recognized that, before the PDA took effect, Title VII did not require employers to treat pregnant women the same as temporarily disabled men and women, *Pallas*, 940 F.2d at 1325. Other courts reached the same conclusion in cases involving the very NCS system at issue here. See *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000); *In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845, 848-49 (8th Cir. 1979).

By ruling that AT&T's continued reliance on lawfully adjusted NCS dates violated Title VII, the decision below plainly gave the PDA retroactive effect. As the majority applied it, the PDA changed the legal consequences of previously lawful pre-PDA actions and imposed new obligations on AT&T, requiring it to grant service credit to women for pre-PDA pregnancy leaves that were not qualified for such credits under AT&T's then-lawful leave policies. Nothing in the PDA justifies such retroactivity.

The majority and respondents offer various arguments to show that imposition of liability in this case does not involve retrospective application of the PDA, but none withstands scrutiny. The PDA did not merely "clarify" that Title VII had always prohibited discrimination on the basis of pregnancy. *Gilbert* established that, prior to the PDA, Title VII's prohibition on sex discrimination did not cover the denial of benefits to pregnant women. If Congress passed the PDA to "clarify" that Title VII had always proscribed such conduct, therefore, then it had to give the PDA

retroactive effect. Congress, however, plainly did not do so.

Nor is it true that each new application of the NCS system gives rise to a new Title VII violation because that system is "facially discriminatory." Contrary to the lower court's theory, employees who took pre-PDA pregnancy leaves are not "similarly situated" to men and women who took pre-PDA disability leaves. Under AT&T's then-lawful policies, employees in the former group were not entitled to full service credit for their leaves, while employees in the latter group were. Thus, the NCS system does not treat "similarly situated" employees differently.

More fundamentally, the lower court's characterization of the NCS system as "facial discriminatory" is *ipse dixit*. Pension benefits are determined based on an employee's term of employment, which is derived from the difference between her retirement date and her facially neutral NCS date. Nothing on the face of the NCS system discriminates on the basis of sex or pregnancy.

Finally, AT&T's post-PDA correction of a single employee's NCS date does not show that AT&T is still applying its pre-PDA leave policies. Such a correction is simply permissible reliance on previously lawful conduct.

II. Even if AT&T's denial of service credit for pre-PDA pregnancy leaves had been unlawful, respondents' challenges to those denials would be untimely. The limitations period for challenging those employment practices expired decades ago. And this Court's decisions in *Evans*, *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *Ledbetter* make clear that those time-barred claims were not revived sim-

ply because, in calculating respondents' pension benefits, AT&T's NCS system gave present effect to past acts of unlawful discrimination.

Indeed, this case is analytically indistinguishable from *Evans*. The seniority systems in *Evans* and this case relied on historical facts (resignations in *Evans*, adjusted NCS dates) caused by no-longer extant policies (no marriage rules in *Evans*, pre-PDA leave policies here). Both systems operated in the same nondiscriminatory manner: United's system treated all resignations the same, regardless of any underlying causes, just as AT&T treats all NCS dates the same, regardless of any reasons they may have been adjusted. Just as the seniority system in *Evans* could rely on the fact of a resignation without violating Title VII anew, so too here, AT&T's NCS system could lawfully rely on the adjusted NCS dates of its formerly pregnant employees.

Bazemore does not dictate a contrary result. There, the employer continued a practice—paying white and black employees different wages for the same work—after Congress had outlawed that very practice. Here, AT&T ceased treating pregnancy leaves differently than disability leaves the moment the PDA took effect. Ultimately, the majority found *Bazemore* to be controlling based on the conclusion that the AT&T's seniority system, like the pay structure at issue in *Bazemore*, is facially discriminatory. Because that characterization of the NCS system is patently erroneous, *Bazemore* does not apply here.

There is likewise no merit to the suggestion that respondents could not have challenged AT&T's service credit denials after they took their pregnancy leaves, because those actions were not completed "employment practices" but were instead mere "precursors" to later pension benefit awards. Because

service credit or seniority is a contract right of central importance to the employment relationship, an employer's denial of service credit is indisputably an "employment practice" that, if unlawful, must be challenged at the time it occurs. This straightforward conclusion is confirmed by the text of Title VII, this Court's analysis of analogous provisions of the National Labor Relations Act, and by the decision in *Ricks*, which involved an analogous denial of tenure.

Respondents' newly-minted claim that they were merely "advised" after their leaves that AT&T intended to deduct service credit when they retired is flatly belied by the record in this case. The record likewise forecloses their new theory that they brought a timely challenge under § 706(e)(2) to a facially neutral system that was adopted for an intentionally discriminatory purpose. There is no evidence that NCS system was adopted for such a purpose, which is why respondents relied exclusively on their invalid "facial discrimination" theory when invoking § 706(e)(2) below. In all events, their claims were time-barred long before § 706(e)(2) was adopted in 1991, and respondents do not—because they cannot—demonstrate that Congress intended to override the rule that a law lengthening the applicable statute of limitations is not to be applied to revive moribund claims. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997).

III. Finally, § 703(h) of Title VII precludes a finding of liability. Section 703(h) provides that the perpetuation of past acts of discrimination by a bona fide seniority system is not an unlawful employment practice at all. And *Evans* holds that the mere fact that a time-barred past event affects the calculation of seniority does not render a seniority system itself non-bona fide.

Tacitly recognizing this, the majority read a clause in the PDA to override § 703(h). In fact, Congress added this clause to foreclose the possibility, suggested by this Court in *Gilbert*, that the last sentence of § 703(h) (known as the Bennett Amendment) would permit wage discrimination on the basis of pregnancy. The majority's contrary reading is not faithful to the text of this clause or the circumstances surrounding its adoption.

ARGUMENT

I. BECAUSE CONGRESS DID NOT GIVE THE PDA RETROACTIVE EFFECT, AT&T'S POST-PDA RELIANCE ON LAWFUL PRE-PDA SERVICE CREDIT AWARDS CANNOT VIOLATE TITLE VII.

The Ninth Circuit's decision necessarily gave the PDA impermissible retroactive effect. Prior to the passage of that Act, this Court's authoritative interpretation of Title VII made clear that AT&T was not required to award full, or any, service credit for time spent on pregnancy leaves. See, *e.g.*, *Gilbert*, 429 U.S. at 127-28. When the PDA took effect, AT&T immediately terminated its prior pregnancy leave policy, and began awarding the same full service credit for pregnancy leaves that it awarded for paid disability leaves. In the decision below, however, the majority ruled that AT&T was obligated, in post-PDA pension determinations, to recognize full service credit for maternity leaves taken *before* the PDA took effect, and that AT&T's failure to do so violates Title VII. By recognizing such an obligation, the majority plainly gave retroactive effect to the PDA, which just as plainly applies only prospectively. The majority's efforts to deny that it was applying the PDA retroactively do not withstand scrutiny.

A. Prior To The PDA, Denial Of Service Credit For Time Spent On Pregnancy Leaves Was Lawful.

Prior to the adoption of the PDA, this Court ruled that employers could lawfully exclude pregnancy and pregnancy-related conditions from generally available benefits policies. Accordingly, AT&T's pre-PDA policy of awarding less than full service credit for time spent on pregnancy leaves complied with federal law.

In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), the Court addressed a constitutional challenge to California's policy of excluding pregnancy from a disability program that provided benefits to private sector employees who were temporarily unable to work and ineligible for workers' compensation. In concluding that the pregnancy exclusion did not violate the Fourteenth Amendment's equal protection guarantee, the Court ruled categorically that distinctions based on pregnancy did not constitute sex discrimination at all. *Id.* at 496 n.20 ("The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.").

Geduldig served as the starting point for the Court's subsequent decision in *Gilbert*, which upheld a similar disability benefits program under Title VII. Like California's plan, General Electric's disability plan provided nonoccupational sickness and accident benefits, but excluded pregnancy. The Court held that this disparate treatment of pregnancy did not constitute sex discrimination under Title VII. *Gilbert*, 429 U.S. at 136 ("Since it is a finding of sex-based discrimination that must trigger the finding of an unlawful employment practice . . . *Geduldig* is precisely in point in its holding that an exclusion of

pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."). As the *Gilbert* dissent recognized, this holding "reject[ed] the unanimous conclusion of all six Courts of Appeals that ha[d] addressed this question." *Id.* at 146-47 (Brennan, J., dissenting) (citing cases). One of those decisions involved the very pre-PDA Bell System pregnancy leave policy at issue here; in light of *Gilbert*'s holding, this Court vacated the Second Circuit's ruling that employees could challenge that leave policy under Title VII. See *Communications Workers of Am.* v. *American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975), *vacated and remanded*, 429 U.S. 1033 (1977).

Given this authoritative construction of Title VII, AT&T's pre-PDA policy of denying full service credit for maternity leaves was plainly lawful prior to the PDA's enactment. Indeed, the Ninth Circuit itself acknowledged in *Pallas* that, prior to the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men," 940 F.2d at 1325 (citing *Gilbert*). Other circuits, in cases involving challenges to the same NCS system at issue here, have reached the same conclusion, see *Ameritech*, 220 F.3d at 823; *Southwestern Bell*, 602 F.2d at 848-49; see also Pet. App. 45a (O'Scannlain, J., dissenting). And the EEOC observed in its brief below that, before the PDA, "'the denial of service credit to women on maternity leave was not unlawful.'" JA 146; see also *id.* at 136-37 n.1.

Once the PDA took effect, AT&T changed its leave policies and granted the same full service credit for maternity leaves that it provided for paid disability leaves. There is no dispute that AT&T has complied with the PDA for all pregnancy leaves taken after the law took effect. AT&T did not, however, grant retro-

active service credit to women who had taken pregnancy leaves before the PDA took effect. This "failure" to "restore" service credit for pre-PDA pregnancy leaves cannot violate Title VII, because the PDA does not apply retroactively.

B. The En Banc Majority Necessarily Gave The PDA Impermissible Retroactive Effect.

Landgraf explains that a statute has retroactive effect if, among other things, it "creates a new obligation," "changes the legal consequences of acts completed before its effective date," or "gives a quality or effect to acts or conduct which they did not have . . . when they were performed," 511 U.S. at 269 n.23 (internal quotation marks omitted). As the majority construed it, the PDA has all of these consequences.

Prior to the PDA's effective date, AT&T could lawfully decide not to award full service credit for time spent on pregnancy leaves and could accordingly adjust the NCS dates of women who took such leaves. Thus, the day *before* the PDA took effect, it was lawful to rely on such adjusted NCS dates when making pension and other seniority-based benefit decisions. Under the majority's reasoning, however, a decision to rely on that same NCS date for that same purpose *after* the PDA took effect violates Title VII.

As the majority construed it, therefore, the PDA "create[d] a new obligation"—*i.e.*, it required AT&T, when making post-PDA benefit determinations, to recognize full service credit for pre-PDA pregnancy leaves even though, prior to the PDA, AT&T had no such obligation. Indeed, the majority was quite explicit on this score. It expressly stated that "AT&T violated Title VII by failing to credit *pre-PDA pregnancy leave* when it calculated benefits owed

Hulteen" *in 1994*. Pet. App. 7a (emphasis added); see also *id.* at 19a ("[i]t was well within AT&T's ability and control to calculate Hulteen's benefits in 1994 giving her service credit for the time she spent on pregnancy leave, and to thus avoid violating the PDA"); *id.* at 21a ("AT&T could have simply credited the applicable number of days to each plaintiff's NCS date when it calculated her benefits"). This is the very essence of retroactivity.

Similarly, under the majority's reading, the PDA "change[d] the legal consequences of acts completed before its effective date": service credit calculations that did not give rise to legal liability before the PDA give rise to such liability now. And, as the majority construed it, the PDA "g[ave] a quality or effect to acts or conduct which they did not have . . . when they were performed": previously lawful NCS date adjustments became unlawful.

It is "'a rule of general application'" that "'a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'" *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006). The PDA contains no such requirement. To the contrary, its language clearly indicates that it applies only prospectively.

The PDA provides that "[e]xcept as provided in subsection (b) [regarding fringe benefit programs], the amendment made by this Act shall be effective on the date of enactment." PDA, § 2(a), 92 Stat. at 2076. Subsection (b), in turn, provides that benefits programs were not affected "until 180 days after the enactment" of the PDA. *Id.* § 2(b), 92 Stat. at 2076. This type of detailed "effective date" provision clearly embodies Congress's decision to apply the PDA prospectively. See *Landgraf*, 511 U.S. 257 n.10 (observing that a similar "effective-date" provision demon-

strated the "nonretroactivity" of the 1991 Civil Rights Act). "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Id.* at 257. Here, the 180-day adjustment period for fringe benefits forecloses retroactivity. It would make no sense for Congress to render illegal pre-enactment pregnancy leave service credit awards, yet give employers a six-month period during which they could continue to rely on, and award benefits based on, such awards.

Not surprisingly, therefore, every court of appeals to have considered the issue—*including the Ninth Circuit itself*—has concluded that the PDA does not apply retroactively. See *Landgraf*, 511 U.S. at 257 n.10 ("The only Courts of Appeals to consider whether the 1978 amendments [to the Civil Rights Act] applied to pending cases concluded that they did not."); see also *Ameritech*, 220 F.3d at 823; *Whitehead* v. *Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1193 (10th Cir. 1999); *Wambheim* v. *J.C. Penney Co.*, 642 F.2d 362, 363 n.1 (9th Cir. 1981); *Fields* v. *Bolger*, 723 F.2d 1216, 1218 n.4 (6th Cir. 1984); *Schwabenbauer* v. *Board of Educ.*, 667 F.2d 305, 310 n.7 (2d Cir. 1981); *Condit* v. *United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980).[6] Accordingly, the PDA

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[6] Undoubtedly because of the Ninth Circuit's ruling in *Wambheim*, the majority made only a passing (and unacknowledged) effort to justify retroactive application of the PDA. Noting that the PDA provides that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the majority claimed Hulteen "was again 'affected by pregnancy' when AT&T calculated her retirement benefits in 1994." Pet. App. 19a. No other court has adopted this strained reading of the phrase "affected by pregnancy," which neither "explicit[ly]" nor "by necessary

does not apply retroactively, and thus does not require employers to award employees service credit for time spent on pre-enactment pregnancy leaves. Because the majority below improperly construed the PDA to require such relief, its decision should be reversed.

C. The Majority's Efforts To Show That It Did Not Apply the PDA Retroactively Are Without Merit.

Implicitly recognizing that the statute has only prospective application, the majority attempted to show that imposing liability for AT&T's reliance on lawful pre-PDA service credit awards did not involve retroactive enforcement of the PDA. First, the majority suggested that the PDA merely clarified that Title VII had always prohibited discrimination based on pregnancy, and that AT&T's pre-enactment service credit decisions were therefore never lawful. Second, the majority deemed the NCS system "facially discriminatory," and held that post-enactment reliance on NCS dates therefore gives rise to "current" violations of Title VII. Third, the majority reasoned that, because AT&T corrected the NCS date of one plaintiff because she did not receive the 30-day service credit for her pre-PDA leave, AT&T is still applying its pre-PDA leave policy. None of these theories withstands scrutiny.

1. The PDA Did Not Merely Clarify That Title VII Had Always Barred Discrimination Based On Pregnancy.

The majority suggested that AT&T's pre-PDA conduct may have been unlawful because "[o]nly one Supreme Court decision [*Gilbert*] cast doubt on whether

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implication" *requires* retroactive application. *Fernandez-Vargas*, 548 U.S. at 37.

Title VII prohibited" pregnancy discrimination, Pet. App. 11a n.6, and Congress later "clarified" that Title VII did include such a prohibition, *id.* at 3a, 18a. This suggestion is baseless. *Gilbert* did not merely "cast doubt" on whether Title VII's prohibition on discrimination "because of sex" or "on the basis of sex" outlawed discrimination based on pregnancy: it held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is *not a gender-based discrimination at all*" under Title VII, *Gilbert*, 429 U.S. at 136 (emphasis added). In so ruling, *Gilbert* flatly "reject[ed] the unanimous [contrary] conclusion of" the lower courts. *Id.* at 146-47 (Brennan, J., dissenting). It is, of course, "this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). Indeed, the Ninth Circuit itself previously harbored no doubts about the controlling effect of *Gilbert*, citing it for the unqualified proposition that, before the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men," *Pallas*, 940 F.2d at 1325.

Respondents half-heartedly suggest that the subsequent decision in *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), somehow rendered *Gilbert*'s ruling ambiguous. See Resp. Br. in Opp. 10 n.3. In *Satty*, however, the Court affirmed that "merely refus[ing] to extend to women a *benefit*" when they take pregnancy leaves does not violate Title VII, and thus an employer's policy "of not awarding sick-leave pay to pregnancy employees" was lawful. 434 U.S. at 142, 144 (emphasis added). By contrast, the Court held that a policy "of denying accumulated [*i.e.*, previously earned] seniority to female employees returning from

pregnancy leave violates . . . Title VII," because such a policy did not merely deny benefits to pregnant women but imposed burdens on them. *Id.* at 139. The Court stressed that "[t]he distinction between benefits and burdens is more than one of semantics," and that *Gilbert*'s ruling that it is permissible under Title VII to deny benefits to women who take pregnancy leaves did not "permit an employer to burden female employees" by divesting them of previously earned seniority. *Id.* at 142.

AT&T's pre-PDA pregnancy leave policy did not divest women of seniority accumulated before such leaves, but rather simply failed to award new service credit for time spent on such leaves. Because an award of service credit or seniority is indisputably a "*benefit[]* that [is] part of an employment contract," *Hishon* v. *King & Spalding*, 467 U.S. 69, 74 (1984) (emphasis added), pre-PDA policies that simply failed to grant the benefit of full service credit to women who took pregnancy leaves were plainly lawful under *Gilbert* and *Satty*.[7] Indeed, as previously noted, the

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[7] This is confirmed by the disposition of the petitions filed in *Satty* and *Communications Workers of America* v. *American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975). The latter petition, which sought review of a decision reinstating a Title VII challenge to AT&T's pre-PDA pregnancy leave policy, was pending at the same time as the petition in *Satty*. If the Court believed that denying full service credit for pregnancy leaves was legally comparable to divesting accumulated seniority from women who took such leaves, it would have granted both petitions and consolidated the cases, or held AT&T's petition pending a decision in *Satty*. Instead, the Court vacated the Second Circuit's decision in the AT&T case in light of *Gilbert*, *see* 429 U.S. 1033 (1977), then granted the petition in *Satty* two weeks later. *See* 429 U.S. 1071 (1977) (No. 75-536).

Ninth Circuit, other circuits and the EEOC have all recognized this. See *supra* at 20.[8]

Nor does it matter that Congress "disapprov[ed] of both the holding and the reasoning of [*Gilbert*]," and therefore "corrected," Pet. App. 11a n.6 (internal quotation marks omitted), or "overruled" that decision by enacting the PDA. Resp. Br. in Opp. 10 n.3 (internal quotation marks omitted). Under settled law, *Gilbert* was the "authoritative statement of what the statute meant *before* as well as after" it was decided. *Rivers*, 511 U.S. at 312-13 (emphasis added). Congress obviously disapproved of *Gilbert*. But if it wanted the PDA to "mak[e] clear that" Title VII had *always* "covered[ed] pregnancy discrimination," Resp. Br. in Opp. 10 n.3, Congress had to give the PDA retroactive effect.

Because the PDA does not apply retroactively, *Gilbert* establishes that Title VII did not prohibit benefit denials based on pregnancy until the date the PDA took effect. Accordingly, the majority was plainly wrong in suggesting that AT&T's pre-PDA service credit awards for pregnancy leaves were unlawful. Thus, by imposing liability based on AT&T's reliance on lawful pre-PDA service credit decisions, the majority necessarily gave the PDA impermissible retroactive effect.

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[8] In light of the EEOC's own recognition that, before the PDA, denying service credit for pregnancy leaves was lawful under *Gilbert* and *Satty*, there is no merit to respondent's reliance on the EEOC's long-since superseded interpretations of Title VII. *See* Resp. Br. in Opp. 10 n.3 (citing 1973 interpretation that preceded the decisions in both *Gilbert* and *Satty*).

2. The NCS System Is Not "Facially Discriminatory."

The majority's "facial discrimination" theory cannot obscure the fact that AT&T's liability under Title VII depends on retroactive application of the PDA. The majority endorsed *Pallas*'s conclusion that the NCS system is "facially discriminatory" because that system supposedly "'distinguishes between similarly situated employees: female employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities.'" Pet. App. 9a (quoting *Pallas*, 940 F.2d at 1327). The majority therefore concluded that "AT&T applied its discriminatory seniority system to Hulteen in 1994, causing her to be deprived of early retirement benefits and thus injuring her." *Id.* at 20a; see also *id.* at 19a (in 1994, AT&T "deliberately cho[se] to use an NCS date that would deprive her of benefits received by those who were not 'affected by pregnancy.'").

But, as the en banc dissenters recognized, Pet. App. 45a-46a, *Pallas*'s theory that the NCS system is "facially discriminatory" depends on retroactive application of the PDA. Absent retroactivity, employees who took pre-PDA pregnancy-related leaves are *not* "similarly situated" to employees who took paid disability leave prior to 1979. Employees in the latter group were entitled to accrue seniority for the duration of their pre-PDA disability leaves, while (under AT&T's lawful pre-PDA leave policies) employees in the former group (like employees who took personal leave to finish college) were not. Only if the PDA retroactively invalidated the previously lawful distinction between these two groups of employees could they be deemed "similarly situated."

Similarly, the majority faulted AT&T for "deliberately choosing to use an NCS date that would deprive [Hulteen] of benefits received by those who were not 'affected by pregnancy.'" Pet. App. 19a. But that NCS date is facially neutral—it is nothing more than a date—and it was lawfully calculated. Because the PDA does not apply retroactively, AT&T cannot violate Title VII by "deliberately choosing to use" a lawful NCS date.

Ultimately, any claim that the NCS system is "facially discriminatory" is pure *ipse dixit*. Respondents' pension benefits were based on their term of employment ("TOE"); their TOEs were calculated based on the difference between their NCS dates and their dates of retirement; and their NCS dates do not mention, let alone draw distinctions based on, pregnancy. As the dissenters and the original panel majority properly recognized, nothing on the face of this system discriminates on the basis of gender or pregnancy. Pet. App. 44a, 81a. AT&T was entitled to rely on the NCS dates produced by its lawful pre-PDA leave policy. Respondents and the majority below cannot alter that right (and thereby give the PDA retroactive effect) through the simple and analytically baseless expedient of labeling the NCS system "facially discriminatory."

3. AT&T's Correction Of An Erroneously Calculated NCS Date Does Not Render The NCS System Unlawful.

Finally, the majority pointed to AT&T's correction of one respondent's NCS date as evidence that AT&T is still applying its pre-PDA leave policy. This reasoning is doubly flawed. Inferences cannot be drawn against AT&T to sustain a grant of summary judgment against it. And even if they could, the majority's "current violation" theory is simply an erroneous

legal characterization of AT&T's reliance on lawful pre-PDA service credit awards.

The parties stipulated that AT&T's Employee Benefit Committee determined that respondent Elizabeth Snyder had not been "given service credit for the first 30 calendar days of [her] leave (as was the policy at the time)." J.A. 46 (¶ 63) (internal quotation marks omitted). The Committee thus readjusted her NCS date, thereby increasing her TOE. *Id.* The majority seized on this fact, claiming it showed that

> when AT&T determines benefits eligibility, it reviews an employee's entire work history and affirmatively chooses to apply "the policy at the time" that the leave occurred . . . . AT&T's practice of applying the discriminatory pre-PDA policies constitutes a separate and actionable act of discrimination.

Pet. App. 21a-22a.

The stipulation of facts, however, nowhere states that AT&T routinely reviews every retiring employee's entire work history, or routinely determines whether its old leave policies were properly applied to the NCS dates of female employees who took pre-PDA pregnancy leaves. Drawing such an inference from a single incident in order to uphold a grant of summary judgment against AT&T in a class action is plainly improper: as the majority recognized, it was obligated to "view[] the evidence in the light most favorable to [AT&T]." Pet. App. 7a (second alteration in original).[9]

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[9] In fact, the proper inference to be drawn is that AT&T was responding to a specific *request* for correction of a specific NCS date. The letter does not state that AT&T discovered the error

More fundamentally, even if AT&T did routinely review its pre-PDA leave policies to determine the accuracy of the NCS dates of employees who took pre-PDA pregnancy leaves, this would not violate Title VII. As AT&T has shown, its pre-PDA leave policies and the resulting NCS date adjustments were lawful. The act of confirming that a policy was applied accurately at a time when it was lawful to apply that policy is nothing more than lawful reliance on then-lawful pre-PDA policies. Because the PDA is not retroactive, AT&T is entitled to assume, when confirming an NCS date, that an accurate application of its lawful pre-PDA leave policies to a pre-PDA pregnancy leave remains lawful.

By contrast, deeming such conduct a "current" violation of Title VII inescapably gives the PDA impermissible retroactive effect. According to the majority, if AT&T routinely confirmed the accuracy of the NCS dates, it was obligated to award additional service credit to women who took pre-PDA pregnancy leaves; failure to do so, according to the majority, is a current act of discrimination. Yet, as AT&T has shown, the PDA imposes no such obligation. Simply put, because the PDA does not require that AT&T award addi-

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in preparing Snyder's request for *retirement benefits*, but rather that it made the discovery "[i]n preparing *your claim for service credit*." J.A. 46 (¶ 63) (internal quotation marks omitted) (alteration in original). The natural inference is that Snyder herself recognized the error in her NCS date and submitted a claim for additional service credit. *See id.* at 38 (¶ 13) (noting that AT&T had authority "to resolve claims for . . . [her] 'TOE"). That conclusion is bolstered by respondents' stipulation that "whether or not Snyder's NCS date was adjusted in the year 2000 does not affect the outcome of" the liability phase of the case, *id.* at 46 n.1, and by their failure to argue below that this adjustment is evidence that AT&T engages in current discrimination.

tional service credit to women who took pre-PDA pregnancy leaves, AT&T's failure to make such awards when determining the accuracy of an NCS date cannot be a current violation of Title VII. Once again, therefore, the majority's finding that AT&T violated Title VII rests on impermissible retroactive application of the PDA.

II. RESPONDENTS' CLAIMS ARE UNTIMELY UNDER *EVANS* AND ITS PROGENY.

Even assuming *arguendo* that AT&T's treatment of service credit for pre-PDA pregnancy leaves was unlawful before the PDA took effect, that employment practice occurred decades ago. Thus, any claim that the practice violated Title VII was time-barred long before respondents brought this suit. Respondents nevertheless claim their suit is timely because they challenge AT&T's decision, within the limitations period, to award them reduced pension benefits as a result of their adjusted NCS dates (which shortened their TOEs). This theory is foreclosed by the line of cases that begins with *Evans*. Respondents' reduced benefits are the current consequences of service credit awards made before the PDA took effect, and *Evans* and its progeny establish that present-day effects of past discrimination do not give rise to a new Title VII claim.

To revive these expired claims, the majority and respondents rely on the groundless theory that the NCS system is "facially discriminatory." They also strain to identify a current act of intentional discrimination, arguing that the pre-PDA service credit awards were not actionable until they suffered a tangible loss of benefits or, alternatively, that AT&T merely "advised" them when they returned from their maternity leaves that it would reduce their service credit upon retirement. Finally, the majority and respondents

rely on § 112 of the Civil Rights Act of 1991, which provides that each injury resulting from a discriminatory seniority system is a new, actionable violation of Title VII. 42 U.S.C. § 2000e-5(e)(2). None of these theories or claims renders respondents' claims timely.

A. Under *Evans* And Its Progeny, Current Effects Of AT&T's Allegedly Discriminatory Pre-PDA Service Credit Awards Are Not New Violations Of Title VII.

This Court has long held that the continuing impact of a no longer actionable past act of discrimination cannot sustain a Title VII claim. Thus, even if AT&T's pre-PDA leave polices and the resulting adjustments to respondents' NCS dates were unlawful, respondents' claims founder on this fundamental principle.

The seminal case is *Evans*. In 1968, United Air Lines forced Evans to resign based on a policy that forbade female flight attendants from marrying. *Evans*, 431 U.S. at 554. Although that policy was later found to violate Title VII, Evans never challenged it. After United eliminated that policy, it rehired Evans but refused to restore any seniority for her employment prior to her forced resignation. *Id.* at 555. Evans argued that this refusal was actionable discrimination under Title VII.

In rejecting this claim, this Court agreed with Evans' contention that United's seniority system gave

> present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a [timely] charge of discrimination . . . . A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory

> act which occurred before the statute was passed.

Id. at 558. Thus, United did not violate Title VII when its seniority system gave present effect to a past act that was no longer actionable.

The facts in *Evans* are indistinguishable from this case. Both the NCS system and United's seniority system relied on historical facts (resignations in *Evans*, adjusted NCS dates here) caused by past discriminatory policies—i.e., the no-marriage policy in *Evans* and the pre-PDA leave policies here. *Evans* holds that a seniority system can rely on such historical facts even if the policies that produced them were unlawful. Thus, even assuming the pre-PDA leave policies that produced respondents' adjusted NCS dates were unlawful, AT&T was entitled to treat those long unchallenged NCS dates as "the legal equivalent of a discriminatory act which occurred before [Title VII] was passed," and thus "as lawful." *Id.*

Moreover, the NCS system operated in the same non-discriminatory manner as United's seniority system. Because United did not recognize seniority for any service preceding a discharge or resignation, this Court concluded that United's seniority system was not discriminatory: it did not "treat[ ] former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason." *Id.* So too here, when respondents took their pregnancy leaves, the NCS system recognized only 30 days service credit for all personal leave, and did not treat women who took personal leaves under AT&T's pre-PDA pregnancy leave policies any differently than it treated male or female employees who took personal leaves for other reasons. And the NCS system has always treated all NCS dates the same,

regardless of the reasons for any adjustments to those dates. Thus, as the United States has recognized, AT&T's seniority system is "logically indistinguishable from the one in *Evans*," Br. of *Amicus Curiae* United States at 13.

In short, "[t]here is no meaningful basis for distinguishing *Evans* and this case." Pet. App. 49a (O'Scannlain, J., dissenting). As with Evans's claim, respondents' pre-PDA seniority calculations are "'merely . . . unfortunate event[s] in history which ha[ve] no present legal consequences.'" *Id.* at 39a.

This same dispositive principle was reaffirmed in *Ricks*, 449 U.S. at 280. There, a professor claimed that the decision to deny him tenure was discriminatory, but he waited another year, when his employment contract expired, to lodge his Title VII complaint. *Id.* Citing *Evans*, this Court deemed the suit untimely because the "only alleged discrimination occurred" at the time of the tenure decision, "even though one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later." *Id.* In other words, "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Id.* (alteration and internal quotation marks omitted).

Similarly, the plaintiffs in *Lorance* alleged that AT&T had adopted an intentionally discriminatory seniority system as part of a collective-bargaining agreement. Those plaintiffs did not bring a claim until several years later, when they were laid off as a result of seniority calculations. This Court held that Title VII required plaintiffs to have raised their challenge when the alleged intentionally discriminatory system was adopted. *Lorance*, 490 U.S. at 908 ("Like Evans, petitioners . . . have asserted a claim that is

wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation.").[10]

This well-settled principle was most recently reaffirmed in *Ledbetter*, 127 S. Ct. at 2169. There, the plaintiff alleged that she had received discriminatory performance evaluations over a number of years. Those poor evaluations allegedly led to a series of lower pay checks and the denial of a pay raise in 1998. *Id.* at 2167. While the evaluations and checks were outside of Title VII's charging period, the denial of the raise was not. Nevertheless, this Court held that under its prior holdings, including *Evans*, the suit was untimely. *Id.* at 2169 ("A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.").

Using language directly applicable here, this Court explained that "[t]he fact that precharging period discrimination adversely affects the calculation of a neutral factor (*like seniority*) that is used in determining future pay does not mean that each new paycheck constitutes a new violation." *Id.* at 2174 (emphasis added). Here, respondents claim that "precharging period discrimination [*i.e.*, the pre-PDA leave policies] adversely affects the calculation of a neutral factor [*i.e.*, the NCS date that governs seniority] . . . used in determining [pension benefits]." But this "does not mean that each new [pension award] constitutes a

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[10] In response to *Lorance*, Congress amended Title VII to allow for liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application. 42 U.S.C. § 2000e-5(e)(2). Respondents cannot avail themselves of this expanded statute-of-limitations provision. *See infra* at 44-47.

new violation." Like the paychecks in *Ledbetter*, respondents' reduced pension benefits are simply present-day consequences of past discrimination; they are not new, actionable violations of Title VII. *Id.* at 2169 ("[C]urrent effects alone cannot breathe new life into prior, uncharged discrimination."). Indeed, the untimeliness of respondents' claims here is even clearer than it was in *Ledbetter*; in contrast to the plaintiff in that case, who was unaware of the discriminatory evaluations that adversely affected her compensation, respondents were repeatedly and fully apprised that AT&T had adjusted their NCS dates after they took their pregnancy leaves. See JA 41, 43-46 (¶¶ 28-31, 39-42, 50-53, 59-61).

B. This Court's Decision In *Bazemore* Cannot Save Respondents' Untimely Claims.

To sidestep the foregoing dispositive authority, the majority below and respondents argue that this case, unlike *Evans* and its progeny, concerns a facially discriminatory system. Pet. App. 10a.[11] Consequently, they argue, it is not *Evans*, but this Court's decision in *Bazemore* that governs. This claim is baseless.

In *Bazemore*, the 1972 amendment of Title VII compelled the defendant state employer to integrate its previously segregated workforce. However, the employer continued to pay black workers less than its

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[11] Respondents also suggest *Evans* is inapplicable because United's no-marriage policy was "entirely outside the seniority system," whereas AT&T's pre-PDA leave policies were an element of the seniority system. Resp. Supp. Br. at 8. This distinction, even if true, is meaningless. Nothing in the *Evans* line of authority suggests that anything turns on whether the precharging conduct was "outside" or inside a seniority system. Rather, the critical question is whether the discriminatory act—whatever it may be—is "made the basis for a timely charge." *Evans*, 431 U.S. at 558.

white workers. This Court held that while "recovery may not be permitted for [pre-Title VII] acts of discrimination," the employer's post-enactment practice of paying disparate wages to similarly situated black and white workers constituted a new violation of Title VII. *Bazemore*, 478 U.S. at 395. "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96.

That holding has no application here. *First*, *Bazemore* applies only to *current* acts of discrimination, "not the carrying forward of a past act of discrimination." *Ledbetter*, 127 S. Ct. at 2173 n.5. *Bazemore* did not involve a situation in which an employer ceased a recently proscribed practice and simply gave current legal effect to pre-enactment decisions. Instead, it involved an employer that "*continued to engage in [an] act or practice*"—paying black workers less for the same work than white workers were paid—after Congress had outlawed that very practice. *Bazemore*, 478 U.S. at 395 (emphasis added); *see also National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 111-12 (2002) (discussing *Bazemore*). Accordingly, "*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory [*i.e.*, presently illegal] pay structure." *Ledbetter*, 127 S. Ct. at 2174. "But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory and neutrally applied.'" *Id.*

Thus, *Bazemore* does not control this case because, as AT&T has explained, the NCS system is facially neutral. Pension eligibility and other benefits provided by AT&T depend on an employee's facially neutral TOE, which is derived from the difference between that employee's retirement date and a facially neutral NCS date. See Pet. App. 44a-45a (O'Scannlain, J., dissenting) (AT&T's retirement plan is "facially nondiscriminatory and neutrally applied" because "calculation of eligibility and benefits under that plan are determined based on an NCS date maintained for each employee."); *id.* at 81a (original panel majority) (respondents' "unsubstantiated labeling of current actions by the defendants as 'facially discriminatory[]' is unpersuasive"); *Ameritech*, 220 F.3d at 823 (*Evans*, not *Bazemore*, applied to identical NCS system because "our case involves computation of time in service—seniority by another name—followed by a neutral application of a benefit package to all employees with the same amount of time."); *Leffman* v. *Sprint Corp.*, 481 F.3d 428, 433 (6th Cir. 2007) ("all non-credited leave is excluded from [the current] seniority calculations, and thus the effects of . . . past characterizations (whether justifiable or not) of leaves of absence as non-credited are now felt equally by men and women and by those with and without children.").

There is simply nothing *facially* discriminatory about the NCS system. Respondents and the majority below have simply used the phrase "facial discrimination" to refer to the fact that the NCS system gives present effect (through adjusted NCS dates) to AT&T's allegedly unlawful pre-PDA leave policies. Calling the NCS system "facially discriminatory," however, is not only inconsistent with any known meaning of the term "facial," it nullifies the central

holding of *Evans*. Indeed, in *Evans*, United's policy indisputably gave "present effect to a past act of discrimination," yet this Court deemed that seniority system non-discriminatory. 431 U.S. at 558.[12]

Second, *Bazemore* is inapplicable because the unlawful conduct in that case was continued racial discrimination after Title VII outlawed such conduct by state employers. "A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute." *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring). In other words, the employer violated Title VII because wages were a "mere continuation of the pre-1965 [pre-Title VII] discriminatory pay structure." *Id.* at 395 n.6. By contrast, it is undisputed that, upon the effective date of the PDA, AT&T changed its leave policies to award service credits to pregnancy leaves on an equal basis with temporary disabilities. JA 50 (¶ 79).

C. AT&T Engaged In No New, Actionable Violations Of Title VII When Respondents Retired.

The majority below also sought to escape the controlling import of *Evans* by reasoning that employees such as respondents could not have brought their suit

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[12] Similarly, the majority below held that *Evans* would control only if AT&T "credited neither pre-PDA pregnancy leave nor pre-PDA disability leave" when it made its benefits calculations. Pet. App. 9a n.4. Such action would have eliminated any effects of prior discrimination. But the very point of *Evans* is that the failure to remedy present effects of past discrimination is not a new act of intentional discrimination.

before the calculation of their retirement benefits. Respondents attempt to elaborate on this theory and to add yet another—that AT&T merely advised them that it would reduce their seniority in the future, but did not do so until they retired. The first of these claims is legally baseless. The second is flatly contradicted by the stipulated facts of the case.

1. AT&T's Pre-PDA Service Credit Awards Were Completed Employment Practices When Respondents Returned From Maternity Leaves.

The majority sought to distinguish *Evans* on the ground that women who took pre-PDA pregnancy leaves could not challenge their adjusted NCS dates until they felt the pension-related consequences of those adjustments. Pet. App. 9a (citing *Pallas*, 940 F.2d at 1327). Expanding on this theory, respondents characterize the award of service credit as a "precursor decision[]," akin to a performance evaluation or reprimand that precedes a "concrete adverse employment action that actually alters an employees' 'compensation, terms, conditions, or privileges of employment.'" See Resp. Supp. Br. at 11-12. They claim that seniority is not itself a term, condition or privilege of employment, and thus its denial is not actionable absent some other adverse employment action. They are mistaken. Service credit and other types of seniority are indisputably "terms, conditions, or privileges of employment" within the meaning of Title VII, and an award or denial of service credit or seniority is a completed employment practice that must be challenged at the time it occurs.

"Because the . . . employment relationship is contractual, it follows that the 'terms, conditions, or privileges of employment' clearly include benefits that are part of an employment contract." *Hishon*,

467 U.S. at 74. Service credit, like other forms of seniority, is a "benefit[ ] that [is] part of an employment contract." *Id.* And, the denial of seniority or service credit to an employee contractually entitled to such credit is a breach of contract. See, *e.g.*, *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of the United Rubber Workers of Am.*, 461 U.S. 757, 763 (1983); *TWA, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977); *Lorance*, 490 U.S. at 905 ("Seniority is a contractual right."). Indeed, "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 766 (1976) (citing S. Slichter, J. Healy & E. Livernash, *The Impact of Collective Bargaining on Management* 104-15 (1960)).

The text of Title VII itself confirms that seniority is a term, condition or privilege of employment by "afford[ing seniority systems] special treatment under Title VII." *Hardison*, 432 U.S. at 81. Section 703(h) provides that it shall "not be an unlawful employment practice for an employer to apply . . . different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate." 42 U.S.C. § 2000e-2(h). Section 703(h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates *which employment practices are illegal and thereby prohibited and which are not.*" *Franks*, 424 U.S. at 758 (emphasis added).

The premise of the Court's analysis in cases addressing the seniority exception is that the award or denial of seniority is an employment practice. In *Hardison*, for example, this Court held that TWA had a bona fide seniority system and that it was not re-

quired to ignore that system and violate other employees' contractual seniority rights to accommodate Hardison's religious beliefs. *Hardison*, 432 U.S. at 80 (had TWA relieved Hardison of Saturday work and required a senior employee to replace him, the latter would "have been deprived of his contractual rights under the collective-bargaining agreement"). *Hardison* illustrates both the centrality of seniority as a contractual right and Congress's recognition of the importance of this term, condition or privilege of employment in enacting Title VII.

The National Labor Relations Act ("NLRA") confirms that seniority awards or denials are terms, conditions or privileges of employment within the meaning of Title VII. This Court has concluded that § 8(d) of the NLRA and § 2000e-2(a) of Title VII contain "analogous language," and therefore that § 8(d)'s meaning "sheds light on the Title VII provision at issue [§ 2000e-2(a)]." *Hishon*, 467 U.S. at 76 n.8.; see also *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-49 (2001).

Seniority is unquestionably a "term" or "condition" of employment under § 8(d) of the NLRA, 29 U.S.C. § 158(d). A prominent treatise notes that "[s]eniority is so obviously a condition of employment, and so commonly exists under union contracts, that litigation questioning its mandatory status has been minimal." 1 *The Developing Labor Law* 1300 (John E. Higgins, Jr., ed., 5th ed. 2006) (footnotes omitted) (citing *United States* v. *Gypsum Co.*, 94 N.L.R.B. 112 (1951), *Nev-Tun, Inc.*, 310 N.L.R.B. 138 (1993)). Thus, seniority is a mandatory subject of bargaining under the NLRA, see *id.*; see also *Remington Arms Co.*, 298 N.L.R.B. 266, 266 n.1 (1990), and an employer who unilaterally alters an employee's seniority (or a group of employees' seniority) without first bar-

gaining with the employees' representatives commits an unfair labor practice. See *Nev-Tun*, 310 N.L.R.B. at 140; cf. *Litton Fin. Printing* v. *NLRB*, 501 U.S. 190, 210 n.4 (1991) (an employer's "failure to lay off in inverse order of seniority" would constitute an unfair labor practice even after a contract so mandating expired because the employer would have unilaterally changed a term or condition of employment). Moreover, an employer who deprives an employee of contractual seniority breaches its collective bargaining agreement with the union and violates the affected employees' contract rights. See, *e.g.*, *Hardison*, 432 U.S. at 79; *TWA, Inc.* v. *Independent Fed'n of Flight Attendants*, 489 U.S. 426, 434-35 (1989).

In sum, AT&T's decision to award less than full seniority to women who took pre-PDA pregnancy leaves was indisputably an "employment practice" affecting a term, condition or privilege of employment. That employment practice was complete—and thus actionable if unlawful—at the time the service credit determination occurred. Respondents, therefore, were required to challenge their pregnancy-related service awards within the limitations period following their return from maternity leave, and their failure to do so renders their current challenges untimely.

Ricks confirms this straightforward conclusion. There, the Court held that the terminated employee's Title VII claim accrued when he lost tenure and that his subsequent claim, following the job loss, was time barred. The Court reached this conclusion because tenure, like seniority, is an important term, condition or privilege of employment; and its loss thus constituted an actionable injury that set the statute of limitations running, even though the job loss did not occur simultaneously.

Like *Ricks*, respondents knew that the consequence of the denial of the particular term, condition or privilege of employment (in *Ricks*, tenure; here service credit) would be the loss of another employment benefit (in *Ricks*, the job itself; here, some amount of pension benefits). There was nothing contingent about the consequences of AT&T's denial of service credit; its consequence was the loss of some benefits, and that denial was therefore a completed act that had to be immediately challenged.[13]

In sum, respondents characterization of an award of less than full seniority as a "precursor decision" without consequences is completely divorced from the reality of the employment relationship, and cannot save their untimely claims.

2. AT&T Did Not Wait Until Respondents Retired To "Deduct" Service Credit For Their Pre-PDA Pregnancy Leaves.

Tacitly conceding that denials of full service credit are actionable when they occur, respondents try to show that AT&T did not actually deny them full service credit for their pre-PDA pregnancy leaves until they retired. Thus, they claim that AT&T merely "advised them that it *would* deduct" service credit for those leaves sometime in the future, and that the loss of seniority did not occur until "AT&T calculated respondents' pension benefits *upon their retirements*." Resp. Br. in Opp. 11, 1 (emphases added) (footnote

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[13] The suggestion that respondents could not have challenged AT&T's seniority awards until they received their reduced pension benefits is also refuted by cases that entertained such challenges decades ago. *See Southwestern Bell*, 602 F.2d at 848-49; *Communications Workers*, 513 F.2d at 1025-26.

omitted); see also *id.* at ii, 2, 3, 4, 12. These statements are demonstrably false.

The parties' stipulation recites that, following her pregnancy leave, "PT&T *in 1969 changed* Hulteen's NCS date from January 5, 1965 to August 3, 1965." JA 41 (¶ 28) (emphasis added). When the Bell System broke up on January 1, 1984 and Hulteen was transferred from PT&T to AT&T, she "*maintained* the August 3, 1965 NCS date she *had had as an employee of PT&T*." *Id.* (¶ 29) (emphases added). Indeed, "[t]hroughout her employment with PT&T and AT&T, Hulteen periodically received documents that contained the August 3, 1965 NCS date." *Id.* (¶ 30). The stipulation makes clear that the NCS dates of the other respondents were adjusted when they returned from their pre-PDA pregnancy leaves, and that they likewise maintained and were apprised of their adjusted NCS dates. See JA 43-46 (¶¶ 39-42, 50-53, 59-61).

Accordingly, respondents conceded below that AT&T simply "continued to use the NCS date *previously computed* for leave taken before April 29, 1979"—the PDA's effective date—and they challenged AT&T's failure to "*restore[] time deducted* due to pregnancy." See JA 75 (emphases added); see also *id.* at 76 ("[a]t no time after [respondents] became AT&T employees, did AT&T recalculate their NCS dates to include *previously uncredited* pregnancy-related disability leave") (emphasis added). The assertion that AT&T waited until respondents retired to "deduct" the time they spent on pregnancy leaves from their TOEs is thus utterly baseless.

Respondents therefore cannot equate AT&T's conduct to that of the hypothetical employer described in *Ledbetter*. See Resp. Br. in Opp. 11. AT&T did not decide in 1969 to discriminate against respondents in

the future, then wait *three decades* to "put that discriminatory intent into practice." *Id.* Here, "the specific employment practice[s] that [are] at issue," *Ledbetter*, 127 S. Ct. at 2167, were decisions to deny full service credit for pregnancy leaves by adjusting the NCS dates of those who took such leaves. These allegedly "discriminatory . . . decision[s] [were] made and communicated to" respondents, *id.* at 2169, *in the 1960s and 1970s*. And these decisions affected respondents long before they retired, as NCS seniority was used "for many employment-related purposes, including job bidding, shift preference, layoffs [and] eligibility for certain benefit programs." JA 39 (¶ 19).

The fact that respondents' pension benefits were not finally calculated until they retired is irrelevant. "The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining [retirement benefits] does not mean that [each pension-setting decision] constitutes a new violation." *Ledbetter*, 127 S. Ct. at 2174. To the contrary, all that respondents have alleged is that AT&T "discriminated against [them] in the past," when it adjusted their NCS dates to deny them full service credit for pre-PDA pregnancy leaves, "and that this discrimination reduced the amount of later [pension benefits]." *Id.* *Ledbetter* and *Evans* make clear that these allegations do not state a claim for a current violation, and respondents cannot escape this fact by mischaracterizing AT&T's pension-setting decisions as post-PDA decisions to "deduct" seniority.

3. Section 706(e)(2) Does Not Render Respondents' Claims Timely.

Finally, the Ninth Circuit deemed respondents' claim timely under § 706(e)(2). This reasoning is mistaken.

In *Lorance*, this Court had held that, although an employee can challenge a "facially discriminatory seniority system . . . at any time," 490 U.S. at 912, a challenge to a facially neutral system that was allegedly adopted for an intentionally discriminatory purpose can be brought only within the limitations period following the adoption of that system. *Id.* at 905-06. In response, Congress enacted § 706(e)(2) of Title VII, which provides that facially neutral but intentionally discriminatory systems can be challenged

> when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2) (emphasis added). Based on § 706(e)(2), the Ninth Circuit concluded that "AT&T applied its discriminatory seniority system in 1994, causing [respondents] to be deprived of early retirement benefits and thus injuring [them]." Pet. App. 20a; see also Resp. Br. in Opp. 14 (arguing that, "even if AT&T's NCS system could somehow be characterized as facially neutral," it is an "intentionally discriminatory seniority system subject to" § 706(e)(2)).

Respondents did not make this argument below, and for good reason: The stipulation nowhere states that AT&T adopted the NCS system or its pre-PDA leave policies with the intent or for the purpose of discriminating against women. Accordingly, respondents posed the issue below as whether AT&T committed "an unlawful employment practice under 42 U.S.C. §2000e-2(a) *and §706(e)(2)* each time it applied its *facially discriminatory* NCS system." JA 71 (emphases added). And they argued that § 706(e)(2) "codified the Supreme Court's conclusion that a facially discriminatory system—*such as AT&T's*—can

be challenged whenever it is applied." *Id.* at 99-100 (emphasis added). See also *id.* at 95 (AT&T's system "remains facially discriminatory . . . . Thus, under . . . §706(e)(2), each application of AT&T's 'seniority system' is a separate discriminatory act"); *id.* at 101 ("by enacting §706(e)(2), Congress clearly evinced an intent to authorize the types of claims [respondents] brought in this case to challenge a *facially discriminatory* seniority system when it was applied") *id.* at 99 (explaining that § 706(e)(2) adopted the reasoning of the *Lorance* dissent, "which would have held both a facially discriminatory system, *like that in Bazemore and here*, and a facially neutral system adopted with an intent to discriminate, like the one in *Lorance*, could be challenged when applied.") (emphasis added).[14]

In all events, § 706(e)(2) cannot render respondents' claims timely. Before its enactment, *Lorance* had established that a facially neutral system that was allegedly adopted for an intentionally discriminatory purpose could only be challenged within the limitations period following its adoption. 490 U.S. at 905. Although § 706(e)(2) changed that rule prospectively, "'a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would alter the substantive rights of a party and increase a party's liability." *Hughes Aircraft*, 520

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[14] Indeed, respondents made clear that any claim that the NCS system was intentionally discriminatory was predicated on their claim of facial discrimination. *See* JA 89 (describing AT&T's pre-PDA leave policies as "facially discriminatory," then asserting that "such a facially discriminatory policy constitutes intentional discrimination regardless of the subjective motivation"); *id.* ("a facially discriminatory policy 'evinces discrimination on the basis of sex' even if motivated by a benign purpose.").

U.S. at 950 (quoting *Chenault* v. *United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994)); see also *id.* ("extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action."). Neither respondents nor the majority have identified any evidence that Congress intended § 706(e)(2) to override this rule, and indeed there is none.

AT&T adopted its pre-PDA leave policies sometime before Hulteen's 1969 pregnancy leave. Thus, even assuming those leave policies are properly deemed part of the current NCS system and were adopted for an intentionally discriminatory purpose, any Title VII claim challenging those policies would have expired decades before Congress enacted § 706(e)(2) in 1991, and were not revived by that provision.

III. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH § 703(h) OF TITLE VII's PROTECTION OF BONA FIDE SENIORITY SYSTEMS.

Section 703(h) of Title VII likewise establishes that, even if AT&T's pre-PDA leave policies were unlawful, the fact that the NCS system gives present effect to those policies (in the form of reduced pension benefits) does not constitute a current violation of Title VII. The majority's conclusion that § 703(h) is inapplicable to this case is mistaken.

A. Under § 703(h), Current Effects Of AT&T's Allegedly Discriminatory Pre-PDA Service Credit Awards Are Not Actionable.

"[S]eniority systems are afforded special treatment under Title VII." *Hardison*, 432 U.S. at 81. Specifically, § 703(h) provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h).

Accordingly, even if a seniority system perpetuates the effects of past sex-based discrimination, those effect are categorically not an "unlawful employment practice" if the seniority system is bona fide, *i.e.*, facially neutral and lacking in discriminatory intent. See generally *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 352-54 (1977); see also *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 65 (1982) ("Under § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved."); *Hardison*, 432 U.S. at 82 ("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice *even if [as here] the system has some discriminatory consequences.*") (emphasis added). The decision below contravenes § 703(h).

AT&T's NCS system plainly satisfies § 703(h). The NCS system is not "facially discriminatory." See *infra* at 36-37. It simply gives present effect to AT&T's pre-PDA leave policies by relying on adjusted NCS dates, which in turn result in shorter TOEs and thus reduced pension benefits for respondents. This type of perpetuation of past acts of discrimination neither undermines the bona fide character of the NCS sys-

tem, nor gives rise to a new violation of Title VII. As the *Evans* Court explained, under § 703(h)

> a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h).

Evans, 431 U.S. at 560.

Accordingly, under § 703(h), respondents' alleged injuries resulting from AT&T's NCS seniority system do not constitute an "unlawful employment practice." See Pet. App. 53a-56a (O'Scannlain, J., dissenting).

B. The PDA Does Not Override The Protections Of § 703(h).

The majority sought to circumvent § 703(h), contending that a clause of the PDA rendered § 703(h) inapplicable in pregnancy discrimination cases. This is simply wrong.

It is evident from its plain language that § 703(h) applies in all cases involving discrimination rendered unlawful by Title VII, including pregnancy discrimination. The exception for bona fide seniority systems applies "*[n]otwithstanding* any other provision of this subchapter," which encompasses Title VII. 42 U.S.C. § 2000e-2(h) (emphasis added). As this Court has observed, the "use of . . . a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override con-

flicting provisions of any other section." *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993).

Indeed, the history of § 703(h)'s drafting not only underscores its signal importance to the passage of Title VII, but it belies the Ninth Circuit's view that Congress would have quietly eliminated the bona fide exception in the pregnancy context. Early versions of Title VII did not contain any provision regarding seniority systems. But during floor debate in the Senate, legislators expressed a fear that Title VII would require massive retroactive readjustments of seniority credits. The many years of discrimination prior to the passage of Title VII would naturally be reflected in employee seniority rights. If these effects of past discrimination were deemed unlawful, employers would have been obliged to unsettle vested seniority rights in order to remove the effects of past discrimination. *Franks*, 424 U.S. at 761.

It was in large part to assuage those fears and to confirm that Title VII had only prospective effect that the compromise substitute bill containing § 703(h) was proposed and enacted. *Id.* at 761 ("[I]t is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.").[15]

Departing from the clear Congressional mandate embodied in the statute, the Ninth Circuit held that § 703(h) applies to discrimination on the basis of race,

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[15] The Senate floor managers introduced several items into the Congressional Record to underscore that a seniority system remained lawful under Title VII—even if it carried forward the effects of pre-Act discrimination. *Franks*, 424 U.S. at 761-62.

religion, national origin and sex, but not if the sex discrimination is based on pregnancy. Pet. App. 27a n.11. This incongruous conclusion rests on a clear misreading of the PDA.

The PDA's first clause provides that discrimination on the basis of pregnancy is sex discrimination. See 42 U.S.C. § 2000e(k) ("[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ."). The second clause then "explains the application of the general principle [embodied in the first clause] to women employees." *Newport News*, 462 U.S. at 678 n.14. It provides that "women affected by pregnancy" must be treated for all employment purposes "as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). This explanatory second clause then ends by providing that "nothing in section 2000e-2(h) [§ 703(h)] of this title shall be interpreted to permit otherwise." *Id.*

Congress added the "nothing in section 2000e-2(h)" phrase to the end of the second clause in order to overrule this Court's suggestion in *Gilbert* that the last sentence in § 703(h)—referred to as the Bennett Amendment—permitted wage discrimination based on pregnancy. The Bennett Amendment was intended to reconcile the Equal Pay Act, 29 U.S.C. § 206(d), with Title VII, by incorporating the Equal Pay Act's affirmative defenses. *County of Washington* v. *Gunther*, 452 U.S. 161, 194 (1981) (Rehnquist, J., dissenting) (noting that the Bennett Amendment means that "'discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act.'") (emphasis omitted). In *Gilbert*, this Court declined to defer to an EEOC regulation finding that pregnancy discrimination was

discrimination on the basis of sex because a regulation by the Department of Labor had interpreted the Bennett Amendment to permit wage discrimination on the basis of pregnancy. *Gilbert*, 429 U.S. at 144-45.

With the passage of the PDA, Congress plainly meant to ensure that "nothing" in § 703(h)—including this Court's interpretation of the Bennett Amendment should—should be construed to permit the wage discrimination based on pregnancy that the PDA prohibited. See *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987) (noting that "the [PDA's] second clause was intended to overrule the holding in *Gilbert*"). Thus, this proviso "was not intended to remove Title VII's protection for bona fide seniority systems in cases involving pregnancy, but rather to foreclose the possibility, raised in *Gilbert*, that the last sentence of Section 703(h) would permit wage discrimination on the basis of pregnancy." Br. of *Amicus Curiae* United States at 15 n.4.

The PDA's legislative history confirms this reading. The House Committee Report explained that "[t]his disclaimer was necessitated by the Supreme Court's reliance in the *Gilbert* case on Section 703(h) of Title VII ("the Bennett Amendment")." H.R. Rep. No. 95-948, at 7 (1978).

> While the Gilbert [sic] opinion is somewhat vague as to the pertinence of the regulation, it does appear that the court regarded the Bennett amendment and the Equal Pay Act regulation, taken together, as somehow insulating pregnancy-based classifications from the proscriptions of Title VII. . . .
>
> Therefore, the committee determined that it was necessary to expressly remove the Bennett

> amendment from the pregnancy issue in order to assure the equal treatment of pregnant workers.

Id.[16] As this legislative history makes plain, the PDA does not diminish the force of § 703(h)'s safe harbor for bona fide seniority systems.

Indeed, all it forbids is an interpretation of § 703(h) that would conflict with the PDA's mandate that pregnant women "shall be treated the same" as similarly situated employees, male or female. Because § 703(h) applies to claims brought by male or female employees, interpreting it to apply here to "women affected by pregnancy" would plainly not run afoul of the PDA's admonition that pregnant women be placed on equal footing with other employees.

The Ninth Circuit's view is simply not faithful to the text of the PDA. In effect, the court of appeals rewrites "nothing in [§ 703(h)] . . . shall be interpreted to permit otherwise" into "nothing in § 703 shall apply in pregnancy discrimination cases." But, "[i]f Congress had intended wholly to prohibit the application of [§ 703(h)] in all pregnancy discrimination cases, Congress would have expressed this intent more clearly, as it did with other provisions in the Civil Rights Act." Pet. App. 57a (O'Scannlain, J., dissenting) (citing 42 U.S.C. § 2000a(e) ("[t]he provisions of this subchapter shall not apply to a private club or

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[16] The Senate Committee Report echoes this reading:

> This disclaimer is made necessary by a suggestion in the Supreme Court's opinion in *Gilbert* v. *General Electric*. That opinion relied in part upon the Bennett amendment . . . .
>
> . . . [B]y expressly precluding reliance on section 703(h) in this context, therefore, the committee merely intends to insure that employers may not rely on the Equal Pay Act to prevent the correction of pregnancy discrimination under Title VII.

S. Rep. No. 95-331, at 7 (1977).

other establishment not in fact open to the public"), *id.* § 2000e-1(c)(2) ("Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer.")).

Nor does it matter that the PDA was enacted after § 703(h). Pet. App. 26a. Construing the PDA to displace § 703(h) is in effect a repeal, which requires a "clear and manifest" indication by Congress. *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007). Neither the text of the PDA nor its legislative history justify suspending the operation of § 703(h)'s exemption for bona fide seniority systems.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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ADDENDUM

ADDENDUM

FEDERAL STATUTES

42 U.S.C. § 2000e: Definitions

* * * *

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

* * * *

[Note] Effective Date of 1978 Amendment; Exceptions to Application

Section 2 of Pub.L. 95-555 provided that:

"(a) Except as provided in subsection (b), the amendment made by this Act [amending this section] shall be effective on the date of enactment [Oct. 31, 1978].

"(b) The provisions of the amendment made by the first section of this Act [amending this section] shall

not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act [Oct. 31, 1978] until 180 days after enactment of this Act."

42 U.S.C. § 2000e-2: Unlawful employment practices

* * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * * *

42 U.S.C. § 2000e-5: Enforcement provisions

* * * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is

adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

* * * *

RESPONDENT'S BRIEF

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No. 07-543

IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether AT&T engaged in a current violation of Title VII when it implemented a facially discriminatory seniority system to set retiring workers' pensions.

2. Whether construing Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), to prohibit an employer from relying on pre-PDA service crediting decisions in making post-PDA pensions calculations gives the PDA an impermissible retroactive effect.

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BRIEF FOR THE RESPONDENTS

Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (PDA), provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. § 2000e(k).

Respondents are retiring employees who took pregnancy disability leave in the 1960s and early 1970s. In establishing their pensions, petitioner AT&T has not treated respondents "the same for . . . purposes" of the receipt of pension benefits as other workers who were "similar in their ability or inability to work" but who took disability leave for reasons other than pregnancy. 42 U.S.C. § 2000e(k). Instead, when AT&T established the amount of respondents' pensions, it implemented a policy that facially discriminates on the basis of pregnancy by giving less credit toward retirement benefits for time spent on pregnancy disability leave than for any other kind of medical leave. In so doing, AT&T committed a present violation of Title VII.

I. Statutory Background

1. As enacted in 1964, Title VII prohibited private employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). While this provision addressed intentional disparate treatment, a companion provision further prohibited employment practices with an unjustified disparate impact on the basis of sex. 42 U.S.C. § 2000e-2(a)(2).

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court held that denying disability benefits to women on pregnancy leave did not violate Title VII's ban on intentional sex discrimination. *Id.* at 145-46. The Court further held that the plaintiffs in that case had failed to show that the employer's disability plan – under which women generally received greater benefits than did men – had an unjustified disparate impact on women simply because it failed to provide coverage for pregnancy-related disabilities. *Id.* at 136-40.

A year later, however, the Court made clear that the limited holding in *Gilbert* did not mean that employers were free to discriminate on the basis of pregnancy in all areas of the employment relationship. In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Court clarified that a "policy of denying accumulated seniority to female employees returning from pregnancy leave," while not constituting intentional sex discrimination, did violate Title VII's prohibition against employment practices that have an unwarranted disparate impact on the basis of sex. *Id.* at 139.

Congress reacted to the Court's pregnancy discrimination rulings by passing the Pregnancy

Discrimination Act, Pub. L. No. 95-555, § 995, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)). In order to "reestablish the law as it was understood prior to *Gilbert*," H.R. REP. NO. 95-948, at 8 (1978), Congress declared that:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.

42 U.S.C. § 2000e(k). Moreover, consistent with the Court's decision in *Satty*, Congress further provided that:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k).

2. As a prerequisite for filing a Title VII claim in court, an employee must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-5(e)(1). Under the time limit applicable here, the employee must file the charge within 300 days "after the unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1).

In 1989, this Court held that the time limit for challenging a facially neutral but intentionally discriminatory seniority system begins to run when the policy is adopted and is not revived when the

policy is applied to the detriment of a particular employee. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 911-13 (1989). In so holding, the Court distinguished a neutral seniority system from one that is discriminatory on its face, explaining that a "facially discriminatory system (*e.g.*, one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied." *Id.* at 912 n.5.

Congress reacted to *Lorance* by embracing its holding with regard to facially discriminatory seniority systems and expanding it to encompass seniority systems that are intentionally discriminatory, but facially neutral. The Civil Rights Act of 1991 thus amended Title VII to provide that:

> For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2).

II. Factual Background And Procedural History

1. AT&T awards pension benefits to certain employees. J.A. 37 (¶¶ 9-10). The amount of the pension, which AT&T calculates upon the employee's retirement, depends in part upon her "term of

employment," defined as her "period of continuous employment in the service of the Company." J.A. 38-39 (¶ 17). Neither the terms of the pension plan nor any other source of authority requires AT&T to use any particular method of calculating a worker's "term of employment." J.A. 39-40 (¶¶ 20-23).

At all times relevant to this case, AT&T chose to calculate terms of employment according to its generalized seniority system, which it calls the Net Credited Service ("NCS") system. J.A. 39-40 (¶¶ 18-23). Under that system, the date an employee begins working for AT&T becomes her NCS start date. Anytime she takes leave, AT&T determines whether to give credit for the time she is absent. If the leave is uncredited, AT&T advances the NCS date by the number of days of uncredited leave. J.A. 39 (¶ 18).

Prior to the effective date of the PDA, AT&T gave employees full credit for all types of temporary medical leave, except one: leave taken for disabilities related to pregnancy. J.A. 47-50 (¶¶ 66-79). Women on pregnancy disability leave received no more than 30 days of credit prior to 1977, and up to 72 days between 1977 and 1979. J.A. 48 (¶¶ 67, 70).

AT&T has always retained the right to change its pension policies. Thus, for example, in 1977 and 1979, AT&T modified its service credit accrual rule with respect to pregnancy leave. J.A. 48, 50 (¶¶ 70, 79). And as part of its court-ordered divestiture in 1982, AT&T was required to revisit its pension policies in light of the reorganization, but decided to continue to award pensions using its prior discriminatory measure of service. J.A. 52-54 (¶¶ 89, 92).

2. Respondents are women who worked for AT&T and took pregnancy disability leave between 1968

and 1976, as well as the union that represents AT&T's non-management employees.

Noreen Hulteen began work on January 5, 1965. J.A. 40 (¶ 24). On November 11, 1968, she began her pregnancy disability leave and gave birth on January 12, 1969. J.A. 40 (¶ 25). While on pregnancy leave, Hulteen required treatment for a medical problem unrelated to her pregnancy. J.A. 40 (¶ 26). Hulteen requested to be allowed to return from pregnancy leave for one day so that the time taken for her new medical condition would be treated as creditable disability leave under petitioner's policies, but the request was denied. As a result, Hulteen was given a total of 30 days credit for the entirety of her pregnancy and unrelated disability leaves, thereby losing credit for 210 days of service. J.A. 40-41 (¶¶ 27-28).

Likewise, when respondents Eleanora Collett, Elizabeth Snyder, and Linda Porter returned from their pregnancy leaves, petitioner adjusted their NCS dates in accordance with its policy, giving each no more than 30 days service credit even though workers taking disability for any other purposes were entitled to credit for the entire length of their leave.[1]

When Hulteen, Collet, and Snyder retired, AT&T reviewed their employment records and set the amount of their pension.[2] Pet. App. 21a. In the

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[1] There is no dispute that the NCS adjustment took place at this time. Petitioner is wrong in reading respondents' brief in opposition to suggest otherwise. *See* Petr. Br. 42-44.

[2] Respondent Linda Porter joined this action anticipating her impending retirement and AT&T's imminent exclusion of

course of that review, AT&T relied on respondents' adjusted NCS dates to determine their term of employment. As a result, AT&T awarded respondents' lower pensions because of their prior pregnancy leaves. *See* Pet. App. 3a.

Within 300 days of being notified of their pension calculations, respondents filed charges with the EEOC, claiming that AT&T discriminated against them in setting their retirement benefits. After receiving a Letter of Determination finding reasonable cause that petitioner violated Title VII, respondents sued AT&T, alleging violations of Title VII and certain provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1104(a)(1). Pet. App. 123a-24a; J.A. 54 (¶ 94).

Relying on the Ninth Circuit's prior decision in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992), the district court granted partial summary judgment to respondents, holding that AT&T had violated Title VII, but that respondents' ERISA claims were time-barred. Pet. App. 106a-28a.

3. AT&T subsequently requested and was granted an interlocutory appeal to challenge the district court's Title VII ruling.[3] Agreeing with the position taken by the EEOC as amicus curiae, the three-judge panel reversed the district court's grant of

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her pregnancy leave from the computation of her pension benefits.

[3] The district court did not certify, and the court of appeals did not grant, interlocutory review of the denial of respondents' ERISA claims. Accordingly, those claims remain pending in the district court.

summary judgment for respondents. Pet. App. 82a-85a. However, on rehearing en banc, the court of appeals reversed course and affirmed.

The en banc panel first rejected AT&T's assertion that the court's prior decision in *Pallas* gave retroactive effect to the PDA. The court explained that *Pallas* had construed the PDA to govern an employer's post-PDA conduct – in *Pallas*, relying on a discriminatory NCS date in awarding early retirement benefits; in this case, relying on the same date to calculate pensions. Pet. App. 12a-15a. Because "[t]he decision to deny benefits was made in the post-PDA world," the court held that allowing respondents to challenge that benefits decision does not give the PDA retroactive effect. Pet. App. 13a, 15a.

The court further reaffirmed its determination in *Pallas* that an employer's reliance upon a discriminatory measure of employment service constitutes a present violation of Title VII. Pet. App. 18a-19a. That conclusion, the court continued, was reinforced by the 1991 Amendment to Title VII, which provides that an intentionally discriminatory seniority system gives rise to a new violation of the Act each time it is applied to the detriment of an employee. Pet. App. 19a-20a (citing 42 U.S.C. § 2000e-5(e)(2)). And, the court explained, AT&T's seniority system is intentionally discriminatory because it "facially discriminates against pregnant women." Pet. App. 23a.

Finally, the court held that by its terms, the PDA precluded AT&T's reliance on Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). *See* Pet. App. 23a-27a.

SUMMARY OF ARGUMENT

It is not uncommon, when an employee retires, for her employer to look back over her work history and calculate her term of service in order to determine the amount of the pension she is due. If, in doing so, the employer applies a rule that gives service credit for all forms of medical leave except pregnancy disability leave, it violates Title VII as amended by the PDA. *See* 42 U.S.C. § 2000e(k). While the leave may have taken place earlier, the only actionable discrimination occurs when the employer fails to treat the worker "the same for . . . purposes [of the] receipt of [pension] benefits . . . as other persons . . . similar in their ability or inability to work." 42 U.S.C. § 2000e(k). And for that reason, the worker's claim is timely so long as she files a charge of discrimination with the EEOC within 300 days of the benefit calculation.

AT&T insists that this case is different, for two reasons: (1) rather than making its initial determination of respondents' terms of employment at the time of their pension calculation, AT&T kept a running tally of seniority credits throughout respondents' careers; and (2) respondents took their leaves before the effective date of the PDA. AT&T argues that under those circumstances the only actionable discriminatory conduct took place when AT&T refused to record respondents' pregnancy leaves as creditable service. And because that act took place many years ago – and before the effective date of the PDA – AT&T insists that subjecting it to liability now would ignore Title VII's time limits for filing charges of discrimination and give the PDA impermissible retroactive effect.

The Ninth Circuit correctly held that neither fact is relevant.

1. The fact that AT&T makes adjustments to an employee's service credits on an on-going basis, rather than determining her term of employment at the time it sets her pension, has no bearing on the time limits for bringing Title VII pension discrimination claims.

First, although the denial of service credits may be discriminatory, it does not ripen into a challengeable adverse employment action until relied upon to the worker's detriment.

Refusing to give credit for a few weeks or months of service has no immediate impact on a worker's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Unless the short period of time is sufficient to change the worker's position in the seniority hierarchy, the crediting decision will not affect the worker's competitive seniority rights with respect to job bidding, shift preference, layoffs, etc. At the same time, whether it will have any effect on fringe benefits is also speculative, depending for example on whether the employee stays with the company long enough for her pension to vest and whether the employer retains or changes its pension benefit formula in the decades between the worker's leave and retirement.

Second, even if respondents could have challenged the initial denial of service credits, they also were entitled to challenge the use of that discriminatory measure of service when it was applied to calculate their pensions.

This Court has consistently recognized that by definition, a facially discriminatory system discriminates each time it is applied, and therefore gives rise to a new, independently actionable

violation with every application. Congress codified this principle in 1991, when it added Section 706(e)(2) to Title VII. The rule reflects a recognition that the discriminatory intent behind an application of a facially discriminatory policy is self-evident, and unlike an isolated and individualized discriminatory decision, the evidence of that intentional discrimination does not grow stale over time. It also minimizes unnecessary litigation, by allowing employees to wait to bring Title VII challenges until the system has had a concrete effect on their compensation or other working conditions.

AT&T's seniority system is facially discriminatory, and thus falls under this rule. The system is discriminatory because it calculates pension benefits in reliance on a measure of service that gives less credit to women who took pregnancy leave but provided the company the same service as others who took identical periods of leave for medical purposes unrelated to pregnancy. And that discrimination is facial because it arises from the rules of the seniority system itself.

AT&T insists that respondents' lower pensions are *not* the result of a facially discriminatory seniority system, but its reasons are unconvincing. The fact that it now gives equal service credit to other women taking post-PDA pregnancy leave shows that the system is less discriminatory than it used to be, but it does not render the system neutral. AT&T also argues that its system is neutral because it only discriminates against women who took pregnancy leave prior to the effective date of the PDA. But that just begs the question whether Title VII allows such discrimination against pre-PDA leave-takers, the subject of AT&T's meritless retroactivity objection.

2. The court of appeals read Title VII, as amended by the PDA, to prohibit AT&T from paying lesser pensions to women who took pregnancy leave before the effective date of the PDA. AT&T objects that this gave the PDA retroactive effect, but that is not so.

The Ninth Circuit made clear that AT&T was not liable for its pre-PDA actions, including its failure to pay respondents equal disability benefits during their pregnancy disability leave[4] or its failure to record that leave as creditable service. That is, the court did not apply the PDA to declare that anything AT&T did prior to the PDA was unlawful.

Instead, the court construed the PDA simply to prohibit AT&T from relying on its pre-PDA discriminatory measure of company service in calculating pensions decades after the PDA became effective. A statute that regulates how parties make post-Act decisions has no retroactive effect. The frustration of AT&T's plans to rely on its discriminatory NCS dates is an unremarkable consequence of the prospective application of the statute.

At any rate, AT&T's retroactivity objection fails for the independent reason that even prior to the enactment of the PDA, Title VII prohibited discrimination regarding seniority on the basis of pregnancy. While this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), held that

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[4] This case involves only pregnancy disability leave – which refers to the period of time during which the employee is unable to work as a result of pregnancy – as distinguished from maternity leave.

denial of equal disability benefits does not constitute intentional sex discrimination, the Court's subsequent decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), made equally clear that pregnancy discrimination relating to seniority has always been unlawful under Title VII's separate proscription against practices having an unjustified disparate impact on the basis of sex.

Finally, the fact that this case involves discrimination with respect to pensions does not render an otherwise prospective application of the statute impermissibly retroactive. While this Court has sometimes protected the financial integrity of pension plans by limiting the relief available for violations of unexpected interpretations of Title VII, the question of an appropriate remedy is not presented at this early stage in the case. And, in any event, there is every reason to believe that the effect of a straight-forward application of Title VII principles will have a very modest financial impact on pension plans.

3. Nothing in Section 703(h) of Title VII supports reversal either. AT&T acknowledges that the provision provides no protection for a facially discriminatory seniority system, and that is what the court of appeals confronted here. Moreover, by its terms, the PDA precludes reliance on Section 703(h) to defend fringe benefit pregnancy discrimination.

4. Finally, the court of appeals' ruling is consistent with the long-held and consistent position of the agency Congress charged with the administration and enforcement of Title VII. The EEOC's conclusion that Title VII has always proscribed pregnancy discrimination with respect to seniority and that such discrimination gives rise to

an unlawful employment practice when the pension setting decision is made, is worthy of deference.

ARGUMENT

I. AT&T Violated Title VII When It Awarded Respondents Smaller Pensions Because Of Their Prior Pregnancy Leaves.

The PDA requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." 42 U.S.C. § 2000e(k).

This Court recently construed similar language in Title VII, prohibiting discrimination "against any individual with respect to his compensation . . . because of such individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1), to create a new cause of action "after each allegedly discriminatory pay decision [is] made." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007). The Court reasoned that it is at the moment of the pay decision that the two essential elements of a disparate-treatment claim – "an employment practice, and discriminatory intent" – come together. *Id.* at 2171.

AT&T does not appear to contest that, as a general matter, a Title VII violation occurs at the time of the pension-setting decision if that is when the employer looks back over the worker's attendance and records, and calculates her term of employment using a rule that gives credit for other kinds of medical leave, but not for pregnancy disability leave. But AT&T insists that the law applies in a

dramatically different way to an employer that keeps a running tab on a worker's term of employment, making service crediting decisions when the worker returns from leave. In that circumstance, AT&T argues, under this Court's decisions in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), and its progeny, the adverse employment action occurs when the crediting decision is made and later reliance on that decision in setting the worker's pension does not give rise to a new unlawful employment action.

It is difficult to believe that Congress intended the time limits of Title VII to turn on whether an employer calculates the term of employment for the first time at retirement or, as AT&T apparently does, double-checks its prior calculations at retirement, *see* Pet. App. 21a. In fact, AT&T's reliance on *Evans* is misplaced for two independent reasons.

First, even if AT&T is right that its initial crediting decision constituted an independently actionable violation of Title VII, its seniority system is facially discriminatory and a facially discriminatory seniority system gives rise to a new violation every time the system is applied, even if the employee could have challenged the system at an earlier point.

Second, in any event, AT&T is wrong in asserting that a service crediting decision can constitute a completed, immediately actionable violation of Title VII. An employer's decision whether to credit a few weeks of service generally has no immediate effect on a worker's compensation, terms, conditions, or privileges of employment. And whether it ever will is entirely speculative.

A. AT&T's Seniority System Is Facially Discriminatory And Therefore Gives Rise To A New Cause Of Action Every Time It Is Applied.

1. AT&T does not appear to contest that "a facially discriminatory [seniority] system . . . by definition discriminates each time it is applied," *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 n.5 (1989), and as a result gives rise to a new, independently challengeable violation with every application, *id.* at 912; *see also Ledbetter*, 127 S. Ct. at 2173-74 (same); *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring and joined by all other members of the Court) (same rule for facially discriminatory pay structure).

Unlike an isolated and individualized discriminatory decision, for which the evidence of discriminatory intent may grow stale over time, the discriminatory intent behind an application of a facially discriminatory rule is self-evident. As a result, "[a]n employer that adopts and intentionally retains such a [policy] can surely be regarded as intending to discriminate . . . as long as the [policy] is used." *Ledbetter*, 127 S. Ct. at 2173.

The rule originally recognized in this Court's cases was codified by Congress in 1991, when it added Section 706(e)(2) to Title VII, providing that "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter . . . when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U.S.C. 2000e-5(e)(2).

2. Because a facially discriminatory seniority system gives rise to a new unlawful employment practice with every application, the rule of *Evans* does not apply to discrimination arising from the operation of such a system. As the Government has explained:

> Challenges to applications of a facially discriminatory policy do not depend on the theory that a practice is unlawful because it *perpetuates* a prior unchallenged discrete act. Rather, such challenges depend on the recognition that when a facially discriminatory policy remains in effect, unlawful intentional discrimination is *presently occurring* . . . .

U.S. Br. *Ledbetter*, No. 05-1074, at 13-14 (emphasis in original); *see also Lorance*, 490 U.S. at 912 n.5 (distinguishing *Evans* from cases involving facially discriminatory seniority systems); *Bazemore*, 478 U.S. at 396 n.6 (same).

3. Respondents' claims fall under the rule of *Lorance* and Section 706(e)(2), and not *Evans*, because the disparity in respondents' pensions stems from AT&T's decision to apply a facially discriminatory seniority system.

AT&T's seniority system, like all others, consists of two principal parts: an accrual rule that determines each worker's creditable term of service and a set of benefit rules that affords certain benefits and privileges in accordance with seniority. *See Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 607-08 (1980) (term "seniority system" includes both accrual rule and benefit provisions).

AT&T does not dispute that the seniority accrual rule that it used to determine respondents' term of

employment was discriminatory in precisely the way the PDA prohibits. Indeed, that is why it changed the rule as soon as the PDA went into effect. *See* Pet. App. 4a-5a. Nor does AT&T dispute that this discrimination was facial – the discriminatory treatment is apparent on the face of the rule. For that reason, there is no need to search out indirect and potentially stale evidence of whether those who enacted the policy intended to discriminate on the basis of pregnancy.

Furthermore, AT&T appears not to contest that a facially discriminatory seniority system necessarily constitutes a system "adopted for an intentionally discriminatory purpose" within the meaning of Section 706(e)(2). *See* 42 U.S.C. § 2000e-5(e)(2); Petr. Br. 44-47; *see also Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).[5] And it is clear that Congress intended Section 706(e)(2) to apply to both facially neutral systems enacted for a discriminatory purpose (as in *Lorance*) and facially discriminatory systems (as alleged here). *See* 42 U.S.C. § 2000e-5(e)(2) (applying to all intentionally discriminatory policies "whether or not that discriminatory purpose is apparent on the face of the seniority provision").

4. This case is thus materially indistinguishable from *Bazemore v. Friday*, 478 U.S. 385 (1986), one of the Court's early applications of the rule that would later be codified in Section 706(e)(2) as applied to seniority systems.

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[5] Respondents' claim that AT&T's seniority system is intentionally discriminatory is premised solely on the fact that the system is facially discriminatory. *Contra* Petr. Br. 45-46.

The employer in *Bazemore*, had long maintained a pay system that facially discriminated against black employees. Upon the enactment of Title VII, the employer began paying new hires the same starting salary regardless of race but did not go back and adjust the base salaries of its previously hired employees. Instead, it applied to all of its workers a pay-setting rule that, viewed in isolation, had the appearance of neutrality: it set each worker's salary to what he or she was paid the year before, plus a raise (which was given without regard to race). *See* 478 U.S. at 397 & nn.7-8; *Bazemore v. Friday*, 751 F.2d 662, 666-67 (4th Cir. 1984) (describing how the pay structure operated). That, the employer believed, was all that Title VII required. Under this Court's decision in *Evans*, it concluded, the continuing present disparity in the wages of some black workers (*i.e.*, those hired before the effective date of Title VII) was simply a continuing effect of past discriminatory decisions (*i.e.*, pre-Act wage decisions) that were lawful when made.

This Court easily rejected that reasoning. *Bazemore*, 478 U.S. at 395-96. The current pay system, the Court held, was facially discriminatory because it relied on the pre-Act discriminatory base salaries to determine post-Act pay. *Id.* That reliance, the Court explained, amounted to a "perpetuat[ion]" of the pre-Act discrimination, *id.* at 395, and the resulting salaries therefore were a "mere continuation of the pre-1965 discriminatory pay structure" which was rendered unlawful upon the passage of Title VII, *id.* at 397 n.6. The case was thus different from *Evans*, the Court noted, because the employer's reliance on a facially discriminatory pay structure gave rise to a present violation every

time it was implemented. *Id.*; *see also Lorance*, 490 U.S. at 912 n.5.

So, too, in this case, AT&T's pension structure is facially discriminatory because it relies upon a facially discriminatory measure of service to the company. Even if the pre-PDA crediting decisions were lawful when made (*but see infra* 44-48), the continued reliance upon them in setting compensation is no less a present violation of Title VII than was the *Bazemore* employer's reliance on its pre-Act measures of the value of its employees' labor when it set post-Act wages.

B. AT&T's Assertion That Its Seniority System Is Facially Nondiscriminatory Does Not Withstand Scrutiny.

AT&T nonetheless insists that the disparity in respondents' pensions is not the result of a facially discriminatory seniority system. But its reasons are unconvincing.

1. A Pension System That Relies Upon A Discriminatory Seniority Accrual Rule Is Facially Discriminatory.

AT&T argues first that its seniority system is neutral because its pension formula gives equal benefits to those with identical NCS dates. Petr. Br. 26, 36-37. But this Court has made quite clear that an accrual rule is part and parcel of a "seniority system" as the term is used in Title VII. *Cal. Brewers*, 444 U.S. at 607-08.[6] Indeed, when this

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[6] In *California Brewers*, the Court construed the term as used in Section 703(h), but AT&T has suggested no reason why

Court gave an example of a facially discriminatory seniority system in *Lorance*, it described a system with a discriminatory accrual rule. *See* 490 U.S. at 912 n.5. And the Court explained that a system that employs such a rule can be challenged when the lesser seniority is relied upon to the employees' detriment (as alleged in *Lorance*), without any suggestion that the benefit rule must be independently discriminatory. *See id.* at 912 & n.5.

As a result, this case is fundamentally different from *Evans*. In *Evans*, there was no allegation that the seniority system itself was facially discriminatory. *See, e.g.*, 431 U.S. at 558 ("Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex."). Instead, this Court explained, the present harm to the employee resulted from discrimination occurring entirely outside of the seniority system (her prior forced resignation) which prevented her from providing the same amount of service as other workers who had not suffered from such discrimination. *Id.* at 557-58. The fact that the neutral seniority system gave present effect to that past discriminatory action, occurring entirely outside the seniority system, did not give rise to a present violation. *Id.* at 558.

But this Court has made equally clear that when the challenged discrimination arises from the facially discriminatory seniority system itself, because the system gives unequal credit for equal service, as

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the same term would have a different meaning in Section 706(e)(2).

alleged here, the employee may challenge any difference in treatment that results from her lesser seniority. *See, e.g., Lorance*, 490 U.S. at 912 & n.5. While an employer might try to frame such cases using the logic of *Evans* – asserting that the present treatment is simply a "present-day consequence of past discrimination" (*i.e.*, the recording of unequal seniority credit), Petr. Br. 34 – this Court and Congress have squarely rejected that view and concluded instead that every action in reliance upon a discriminatory measure of seniority gives rise to a new violation of Title VII. *Contra* Petr. Br. 34 & n.11.

2. AT&T's Abandonment Of Its Discriminatory Accrual Rule Does Not Render Its Seniority System Neutral When It Continues To Rely Upon The Prior Service Calculations In Awarding Present Day Benefits.

AT&T and the Solicitor General further insist that AT&T's seniority system is not facially discriminatory because the accrual rule it applies to post-PDA pregnancy leave is neutral. This argument fails because ceasing to discriminate against *some* women (*i.e.*, those who become pregnant after the passage of the PDA) does not alter the fact that AT&T's current seniority system continues to discriminate against others by setting pensions using a measure of service that gives those women less credit for the same time served simply because they took pregnancy leave rather than other forms of temporary disability leave.

Thus, as used in Section 706(e)(2) and *Lorance*, the term "seniority system" must be understood to include the body of rules that govern the complaining employee's treatment, including the accrual rules

that determined the worker's seniority, even if those rules have since been altered as applied to others.

AT&T's contrary construction runs directly counter to a core purpose of Section 706(e)(2), which was to avoid putting employees to the "Hobson's choice either to bring what may be an unnecessary and premature lawsuit against his employer, to the detriment of the employment relationship, or to forego any possibility of recovery in the event that the plan ever should operate to injure him." H.R. REP. NO. 102-40(I), at 61 (1991). Congress, in other words, intended Section 706(e)(2) to assure workers that they would not lose their right to equal treatment by waiting to see if discriminatory alteration of their seniority would have an actual adverse effect on their employment. AT&T's interpretation completely vitiates that salutary function. Under its interpretation, unless an employee immediately challenges the discriminatory denial of seniority credit, she runs the risk that her employer will change that accrual rule before the loss of seniority affects her compensation or other terms of employment, thereby immunizing its prior discrimination from all challenge.

No legitimate purpose would be served by such a system. Because the discrimination at issue is facial, there is no risk that evidence will grow stale. *Cf. Ledbetter*, 127 S. Ct. at 2171. Moreover, neither AT&T nor the Solicitor General identifies any reason why Congress would provide a cause of action to a retiring employee in respondents' position only if her employer continues to maintain a discriminatory accrual rule. Whether the accrual rule continues to be applied at the time an employee retires is of little incident to the retiring employee, who will no longer

be accruing seniority. That the accrual rule remains discriminatory in the present only means that the employer will also discriminate against other, future, retirees. And declining to apply the discriminatory accrual rule to *other* employees does not render the discrimination suffered by respondents any less intentional or any less facial.

Respondents' position in this regard is consistent with the Court's decision in *Bazemore*, in which the employer's abandonment of its pre-Act policy of giving blacks lower starting wages and pay raises was not sufficient to render its pay structure nondiscriminatory. *See Bazemore*, 478 U.S. at 395-96. To the contrary, because the post-Act salary policy continued to rely on those pre-Act pay-setting decisions (by basing present salary on the previous year's pay), the Court concluded that the present pay structure was facially discriminatory and subject to challenge with every pay check. *Id.* at 395-96. As a result, the Court held that the court of appeals in *Bazemore*, "plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated." *Id.* at 396.

So, too, in this case, AT&T plainly errs in insisting that its abandonment of its discriminatory accrual rule insulates from challenge its continued reliance on the resulting discriminatory measure of service in making post-Act benefit decisions.

3. That AT&T's Seniority System Discriminates Only Against Women Who Took Pre-PDA Pregnancy Leave Does Not Render It Neutral.

In the context of it retroactivity argument, AT&T also asserts that its seniority system is not facially

discriminatory because respondents are not "similarly situated" to other workers who receive full pensions. *See* Petr. Br. 25. This is so, it claims, because its policy provides lower benefits only for the subset of women against whom it was lawful to discriminate against at the time they took their pregnancy disability leave. *Id.* Any suggestion that this argument would render respondents' claims untimely is misconceived.

As AT&T appears to recognize, this argument can only succeed if AT&T is right on the merits of its retroactivity argument. *See* Petr. Br. 25 (acknowledging that "these two groups of employees could . . . be deemed 'similarly situated'" if the PDA rendered discrimination between the groups unlawful). That is, if Title VII entitles respondents to the same pension as their coworkers who took other forms of medical leave or who took pregnancy leave post-PDA, then they *are* similarly situated to their co-workers in every respect material here.[7] And as discussed below, Title VII does in fact require such equal treatment. *See infra* 36-53. If it does not, respondents' claims fail on the merits and the timeliness of their charges is irrelevant.

AT&T's argument also fails for the independent reason that the rule of *Lorance* and *Bazemore* applies even when an employer discriminates solely against

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[7] This is true even if AT&T were right (which it is not, *see infra* 44-48), that at the time respondents took their leave, it was lawful to discriminate on the basis of pregnancy with respect to seniority. So long as it is clear that respondents are entitled to equal pensions now, there can be no argument that AT&T's policy of denying equal pensions is anything but facially discriminatory.

workers who were not protected prior to the effective date of the relevant provisions of Title VII. In *Bazemore*, for example, the employer could have made the same claim AT&T makes here: its pay system paid unequal wages only to those hired before the effective date of Title VII, whose base salaries were established at a time when Title VII provided them no protection. 478 U.S. at 390-91, 394-95. This Court has nonetheless recognized that the pay system was facially discriminatory. *See, e.g.*, *Ledbetter*, 127 S. Ct. at 2173.

The insight of cases like *Bazemore* and *Lorance* is that the intent behind an employment policy is fairly attributed to every application of the policy. A policy that says "no women in the company gym" discriminates on the basis of sex every time it is applied, even if it was first adopted in 1960, when women were differently situated from men in the sense that they were not protected from such discrimination. What changed in 1964 was the lawfulness of the discrimination, not the facially discriminatory nature of the policy. And this would be true even if the employer changed its policy to discriminate against only the subset of employees who were previously unprotected (*e.g.*, "no women hired before 1964 in the company gym" or "no one excluded from the gym in 1960 may enter").

Accordingly, AT&T's assertion that respondents are not "similarly situated" because they are not owed equal pensions is a defense on the merits, not a legitimate objection to the application of Section 706(e)(2) or *Lorance* to determine the timeliness of respondents' complaints.

4. *Section 706(e)(2) Applies To Facially Discriminatory Seniority Policies That Predate The PDA And Title VII.*

The Solicitor General makes a related argument specific to the text of Section 706(e)(2). That provision, he points out, applies only "with respect to a seniority system that has been adopted for an intentionally discriminatory purpose *in violation of this subchapter*." U.S. Br. 24-25 (quoting 42 U.S.C. § 2000e-5(e)(2) (emphasis added)). The provision thus has no application here, the Government argues, because at the time AT&T's system was adopted, discrimination on the basis of pregnancy was not yet "'in violation of [Title VII].'" U.S. Br. 24. Under that view, Section 706(e)(2) does not apply to any seniority system – even to a seniority system that discriminates on the basis of race on its face – enacted before the effective date of Title VII. That conclusion is inconsistent with the basic purposes of the provision and is not required by the statute's text.[8]

There is no question that the phrase "in violation of this subchapter" modifies the phrase it immediately follows ("intentionally discriminatory purpose"), requiring the plaintiff to allege that the challenged seniority system intentionally discriminates on a basis prohibited by Title VII (*e.g.*, race, sex, religion, etc.). The textual question posed

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[8] It is also ultimately immaterial. Even if the Court construed Section 706(e)(2) as addressing only post-enactment seniority systems, petitioner's system would be subject to challenge under the principle recognized in *Lorance*, which Section 706(e)(2) did not displace.

by the Solicitor General is whether the phrase "in violation of this subchapter" also modifies the more remote phrase "adopted for," requiring the plaintiff to show that Title VII prohibited the intentional discrimination behind the system at the time it was adopted.

As the Solicitor General has recently argued to this Court, "[t]he last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that are more remote." U.S. Br. at 8, *Mendoza-Gonzalez v. United States*, (No. 08-5316) (citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:33, at 369-72 (N. Singer, 7th ed. 2007)). Applying the last antecedent rule, the phrase "in violation of this subchapter" is best read to modify the word "intent," not "adopted."

In this case, ordinary usage is consistent with Congress's manifest intent. Although debate over other aspects of the 1991 Amendments was contentious, there was a broad consensus that Section 706(e)(2) was needed to overrule any aspects of *Lorance* that would function to time-bar workers from challenging "contemporary applications of discriminatory rules adopted prior to 1965 – that is, all the discriminatory rules in existence when Title VII was adopted." H.R. REP. NO. 102-40(I), at 61 (1991); *id.* at 104, 153. Congress made clear it never intended Title VII to operate in that manner and that Section 706(e)(2) would operate to prevent that possibility. *Id.* at 61.

Accordingly, the phrase "in violation of this subchapter" was intended simply as a short-hand reference to the kinds of discrimination addressed by Title VII (*i.e.*, on the basis of race or sex, but not age

or disability) not as an obscure method of establishing a grandfather clause. "To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights" of those protected by Title VII. *Bazemore*, 478 U.S. at 395.

5. Section 706(e)(2) Does Not Act To Retroactively Revive Expired Claims.

AT&T also argues that Section 706(e)(2) cannot be applied to this case to revive claims for which the limitations period has already expired. Petr. Br. 47.

It appears that this assertion may be addressed at an argument respondents do not make – namely, that AT&T's seniority system is facially neutral but intentionally discriminatory. *See* Petr. Br. 45-46. But to the extent AT&T suggests that Section 706(e)(2) cannot be applied to a system that is facially discriminatory, *see, e.g.*, Petr. Br. 33 n.10, that claim has no merit. As applied to facially discriminatory seniority systems, Section 706(e)(2) simply codifies the long-standing rule recognized in *Lorance* and *Bazemore*. Moreover, Section 706(e)(2) does not revive previously expired claims, but rather makes continued enforcement of an intentionally discriminatory seniority system a new unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(2). Such legislation proscribing post-enactment conduct is not retroactive. *See, e.g., Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 45-46 (2006).

II. Discriminatory Denial Of Service Credit Is Not An Immediately Challengeable Unlawful Employment Practice.

Even setting aside the special rules for facially discriminatory seniority systems, the *Evans* line of cases is inapplicable for the independent reason that the discriminatory awarding of seniority credits is not an adverse employment action in itself and cannot be challenged until acted upon. Indeed, neither AT&T nor the Solicitor General is able to cite a single case in the forty-year history of Title VII in which a court or the EEOC has entertained a charge of discrimination with respect to a service crediting decision.

A. Title VII Allows A Challenge To Discrimination Only When It Alters Compensation, Terms, Conditions, Or Privileges Of Employment.

Title VII does not prohibit every act of discrimination within the employment relationship. In balancing employees' interest in freedom from discrimination against employers' interest in running their businesses without undue federal regulation, Congress set an important threshold: Title VII prohibits discrimination when it amounts to an "adverse employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993). That is, the discrimination must alter the employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).[9]

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[9] As petitioner does not appear to contest, the rule of *Evans* does not apply if the prior act of discrimination was

Employers make numerous decisions, and take a variety of actions, that may *someday* affect an employee's terms, conditions, or privileges of employment. An adverse performance review or a disciplinary warning can affect promotion and pay raise decisions. So can a decision to record an absence as unexcused. The way in which an employer counts and records productivity data – for example, how many units a worker produced or a salesman sold – may eventually result in the alteration of salary or bonuses. But the effect is not certain. The worker might not qualify for the promotion on other grounds, or may not apply for it. And the marginal difference in the employee's credited attendance, sales, or productivity may not be enough to have a concrete effect on her pay or other terms and conditions of employment.

For that reason, the mere act of discrimination in such cases is not sufficient to establish Title VII liability. Thus, this Court recognized in *Ledbetter* that even when an employee claims (as Ledbetter did) that she was denied a raise because of a discriminatory performance evaluation, the unlawful employment practice occurred not when the performance review was completed, but rather when the review had a concrete effect on the setting of her pay. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165, 2169-71 (2007); *Accord, e.g., Taylor v. Small*, 350 F.3d 1286, 1292-93 (D.C. Cir. 2003); *Oest*

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unchallengeable at the time because it did not rise to the level of an adverse employment action. *Evans* applies only if the plaintiff had, and forewent, a prior opportunity to challenge the employer's discriminatory conduct. *See Evans*, 431 U.S. at 558; Petr. Br. 30-31, 38-42.

v. Illinois Dep't of Corr., 240 F.3d 605, 612-13 (7th Cir. 2001); *Spears v. Missouri Dep't of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000); *see also* 29 C.F.R. § 1614.107(a)(5) (as applied to federal sector claims, an EEOC charge alleging only a "preliminary step to taking a personnel action" must be dismissed).

B. Discriminatory Recording Of Service Credits Does Not Immediately Or Necessarily Alter A Worker's Compensation, Terms, Conditions, Or Privileges Of Employment.

In this case, AT&T's discriminatory failure to record full service credit for pregnancy leave did not constitute an actionable unlawful employment practice because it had no immediate impact on respondents' compensation, terms, conditions, or privileges of employment, and any such future effect was inherently speculative.

To be sure, an employee may immediately bring a lawsuit when an employer alters the rules of a seniority system for a discriminatory purpose. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 905-06 (1989). But AT&T does not claim respondents were required to challenge its seniority rules when they were adopted; instead, it argues that employees are allowed – indeed required – to bring a Title VII claim every time an employer applies a settled accrual rule to determine whether to record a particular period of leave as creditable service. That action does not change the terms of a seniority

system, as in *Lorance* and all the National Labor Relations Act cases AT&T cites.[10]

Nor does such discrimination necessarily change a worker's seniority or affect any of the rights greater seniority gives. In contending otherwise, AT&T confuses service credits with seniority. Competitive seniority rights generally arise from an employee's relative position in the workplace seniority hierarchy, not from the precise number of days of service credited by the employer. For instance, denying six weeks of service credit to a worker who is separated by two years of service from the next most junior and senior employees at the firm will not immediately change the worker's seniority because it will not alter her relative seniority position. And it might never do so.

At the same time, the effect of such a crediting decision on noncompetitive seniority benefits – like a pension – is also uncertain. Many employees leave the company before their pensions vest. The amount of credit at issue could have no effect on a worker's pension in a company that rounds years of service up

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[10] None of those cases discuss individualized service crediting decisions, but instead talk more broadly about the requirement of negotiating over a seniority system. *See* Petr. Br. 40-41.

The only NLRA decision of which respondents are aware that touches upon the denial of service credit suggests that an immediate challenge is not required. *See NLRB v. District 23, United Mine Workers of America*, 921 F.2d 645, 649 (6th Cir. 1990) (reviewing NLRB decision providing relief to worker who challenged lay off on basis of assertedly discriminatory denial of seniority credit years earlier, without questioning timeliness of claim).

(or down) for pension purposes, particularly given the relatively small amounts of time at issue here. And during the many years between the initial recording of pregnancy leave and the pension-setting decision, the employer may change its policies. It might, for example, decide to restore the withheld service credit, as AT&T always had the right to do, because it decides that providing equal treatment is the right thing to do, because it comes to believe that equality of treatment is legally compelled (by state or federal law), or as a result of negotiations with a union.[11]

Accordingly, any injury suffered by employees at the time of a crediting decision is distinctly abstract and conjectural.[12] Whether or not such harms would be sufficient to satisfy Article III standing, *cf.*, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983), they are hardly the stuff of the "adverse employment action" Congress established as a threshold for invoking the machinery of Title VII's administrative process or the federal courts' jurisdiction.

Indeed, as noted above, it was precisely the speculative effect of seniority discrimination that lead Congress to provide in Section 706(e)(2) that workers need not challenge discriminatory seniority

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[11] In addition, at the time of the service crediting decision, the benefit program may not even be in existence. *See, e.g.*, *Pallas v. Pacific Bell*, 940 F.2d 1324, 1326 (9th Cir. 1991) (pre-PDA crediting decision affected early retirement program instituted in 1987).

[12] This case is thus distinguishable from *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in which the plaintiff's termination was an "*inevitable* . . . consequence of the denial of tenure." *Id.* at 257-58 (emphasis added).

systems until the discrimination affects their compensation or other job benefits. A contrary rule, Congress concluded, "forces the filing of speculative charges and produces unnecessary litigation before a practice has been applied to employees. It also causes needless strain on employment relationships." H.R. REP. NO. 102-40(I), at 60 (1991). The same would be true of a rule that requires an immediate challenge to discriminatory recording of service credits.

C. The Fact That AT&T May Have Relied On Its NCS Dates For Other Purposes Prior To Setting Respondents' Pensions Does Not Render Their Pension Discrimination Claims Untimely.

AT&T suggests that even if respondents could not challenge the adjustment of their NCS dates when made, they could have challenged the alteration at some point before they retired because "NCS seniority was used 'for many employment-related purposes, including job bidding, shift preference, layoffs [and] eligibility for certain benefit programs.'" Petr. Br. 44 (quoting J.A. 39 (¶ 19)). That argument also fails.

First, AT&T does not claim, and the summary judgment record does not show, that respondents were ever denied job bids or shift preferences, or were otherwise injured in any concrete way by the reduction in their NCS credits before the calculation of their pensions.

Second, and in any event, the fact that an employee has foregone one opportunity to challenge a discriminatory employment practice does not give the

employer license to repeat the discrimination in the future, and with respect to other aspects of the employment relationship. "[I]f an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed." *Ledbetter*, 127 S. Ct. at 2169. "In other words, a freestanding violation may always be charged within its own charging period regardless of its connections to other violations." *Id.* at 2174. Thus, if an employer relies on an intentionally discriminatory performance evaluation to deny a bonus and later relies on the same evaluation to select the worker for layoff, each decision would be independently actionable. So, too, in this case: a worker's failure to challenge AT&T's reliance on a discriminatory measure of service to deny a shift preference would not preclude the worker from later filing a timely challenge to AT&T's reliance on the same NCS date to establish her pension.

III. Construing The PDA To Prohibit Post-Act Reliance On Pre-Act Service Calculations Does Not Give The PDA An Impermissible Retroactive Effect.

AT&T also complains that by construing the PDA to prohibit it from relying on its pre-Act NCS date calculations, the court of appeals gave the PDA an impermissible retroactive effect. *See* Petr. Br. 15. That claim is meritless as well.

A. The Court of Appeals' Interpretation Of The PDA Does Not Give It Retroactive Effect.

1. The first consideration in determining whether a statute has a retroactive effect is whether

the relevant activity prohibited by the statute – the "retroactivity event" – occurred before or after the passage of the statute. That is, "[t]he critical issue . . . is not whether the rule affects 'vested rights,' or governs substance or procedure, but rather what is the relevant activity that the rule regulates." *Republic of Austria v. Altmann*, 541 U.S. 677, 697 n.17 (2004) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring)); *Landgraf*, 511 U.S. at 265 ("'[T]he legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place*'" (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring))) (emphasis added). This is so because the "branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts, not all difficult choices occasioned by new law." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 46 (2006).

Here, the Ninth Circuit did not construe the PDA to "change[] the legal consequences of acts completed before its effective date." Petr. Br. 19 (quoting *Landgraf*, 511 U.S. at 269 n.23). The court of appeals made clear that AT&T was not liable for its failure to pay respondents equal disability benefits during their pre-PDA pregnancy leave. Pet. App. at 16a. Nor did the court hold that AT&T was liable for the act of failing to record that leave as creditable service when it was taken. Instead, the court construed Title VII to prohibit AT&T from relying on those prior crediting decisions when setting pensions at the end of respondents' careers, decades after the PDA took effect.

AT&T nonetheless complains that this construction of the PDA disrupts its ability "to rely on

[its previously] adjusted NCS dates when making pension . . . benefit decisions." Petr. Br. 18. That is true, but it does not make the statute retroactive. "A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment." *Reynolds v. United States*, 292 U.S. 443, 448-49 (1934); *see also Landgraf*, 511 U.S at 269; *Cox v. Hart*, 260 U.S. 427, 435 (1922). For example, a statute that forbade public universities from relying on the SAT test in future admission decisions would not have a retroactive effect even if the school had been planning on relying on such tests and even if the testing was entirely lawful when undertaken.

Nor is a statute retroactive simply because it requires a defendant to incur expenses it did not previously anticipate. *See, e.g., Reynolds*, 292 U.S. at 449 (no retroactive effect to statute precluding hospital from deducting cost of care from veteran's pension, even as applied to costs already incurred as of date of statute's enactment); *Chicago & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 73-74 (1915) (no retroactive effect to statute requiring railroads to maintain specified drainage features on track beds, even with respect to tracks constructed before the Act).

The fact that AT&T had formerly marked respondents for future discriminatory treatment (by advancing their NCS dates) does not render retroactive the PDA's frustration of that intention. For example, if an employer had, in 1960, recorded in each worker's file a pension formula that provided half the benefits to women allowed to men with the same service, there should be no question that Title

VII would prevent it from implementing that formula when she retired in 2008. Nor should there be any complaint that this would give Title VII an impermissible retroactive effect.

Likewise, Title VII does not operate retroactively when it prohibits a law firm from refusing to promote a woman to partner because of her sex, even if the firm had, prior to the Act, classified her into a "nonpartnership" track. The frustration of the firm's plans to rely on that prior classification decision, and the attendant higher cost of equal treatment, is simply a natural consequence of the prospective operation of the statute.

This Court's decision in *Bazemore* similarly illustrates that a prospective law may require changes in the way individuals and corporations treat past events for purposes of post-Act decisionmaking, without implicating the presumption against retroactivity. Although the Court construed Title VII to preclude an employer from relying on pre-Act salaries in setting post-Act wages, nowhere did the Court (or anyone else) suggest that this gave Title VII a retroactive effect. This is true even though "the day *before* the [Act] took effect, it was lawful to rely on" the employer's prior discriminatory decisions in making pay decisions. Petr. Br. 18 (emphasis in original); *see also Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998).

Similarly, requiring AT&T to use a different, nondiscriminatory measure of employment service in setting pensions does not subject AT&T to liability for "a past act that [it] is helpless to undo." *Fernandez-Vargas*, 548 U.S. at 30. Instead, AT&T was held liable for its present-day decision to violate the PDA's core requirement of equal treatment in the

"receipt of benefits under fringe benefit programs." 42 U.S.C. § 2000e(k).[13]

2. That this particular application of the PDA involves pension benefits does not warrant a different conclusion.

As AT&T's amici note, this Court has declined to authorize money damages awards in rare instances in which this Court's construction of Title VII constitutes an unexpected and "substantial departure" from prior understandings, and damages would "threaten the security of both the [pension] funds and their beneficiaries." *Florida v. Long*, 487 U.S. 223, 233, 236 (1988); *see* ERIC Br. 9-12. But the question of appropriate remedies is not before the Court – it does not fall within the question presented, was not raised in AT&T's opening brief or petition for certiorari, was not addressed by either of the lower courts, and falls outside the scope of the certified interlocutory appeal.

The question here, instead, goes to the meaning of Title VII's non-discrimination requirement. And on such substantive questions, this Court has not hesitated to construe Title VII to prohibit even long-established benefit and pension practices. *See Arizona Governing Comm. for Tax Deferred Annuity*

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[13] As the court of appeals recognized, Congress's adoption of Section 706(e)(2) reinforces the conclusion that the PDA has no retroactive effect here, as applied to a facially discriminatory seniority system. *See* Pet. App. 19a-21a. But in the end, for the reasons set forth above, construing the PDA to prohibit reliance on intentionally discriminatory measures of service does not give the statute retroactive effect whether the discriminatory seniority date is the result of an individualized decision or a systemic policy.

and Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1079-36 (1983); *see also City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707-18, 710 (1978) ("[T]here is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage.").

In any event, despite AT&T and its amici's alarmist predictions, there is no reason to think that a ruling in respondents' favor would have any substantial deleterious effect on the administration and solvency of pension funds.

First, neither AT&T nor its amici suggest that a significant number of employers discriminate in pension benefits against women who took pre-PDA pregnancy leave. Despite respondents' repeated challenges – *see* BIO 17-18; Resp. Supp. Br. 2-3 – neither AT&T nor the Solicitor General (who has access to the extensive records and experience of the EEOC) has come forward with any evidence of a widespread business practice of such discrimination.[14] For all that appears, if it was ever

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[14] While the ERISA Industry Committee and the Equal Employment Advisory Council make generic predications of catastrophe, neither represents that any of its members actually apply AT&T's discriminatory policy, or identify any other businesses that do. Nor have other industry groups – for example, the National Chamber of Commerce – seen the issue as sufficiently important to their members to warrant participation in this case. Indeed, as far as respondents have been able to determine – without significant contradiction from petitioner, *see* Petr. Reply Br. 10-11 – the practice originated with the Bell Telephone companies and has been adopted by its predecessor corporations and some of its direct competitors in the telecommunications field.

true that many companies followed AT&T's practices, almost all have abandoned them, perhaps in the immediate aftermath of Title VII (when the EEOC and the lower courts construed Title VII to prohibit pregnancy discrimination)[15] or in response to state laws that have long been construed to prohibit such discrimination, notwithstanding this Court's decision in *Gilbert*.[16]

Second, rather than affecting all female employees, as in *Manhart* and *Long*, this case affects only women who took pregnancy leave prior to the PDA and have remained with the company long enough for their pension to vest.[17]

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[15] Prior to *Gilbert*, "[e]ighteen Federal district courts and all seven Federal courts of appeals which ha[d] considered the issue ha[d] rendered decisions prohibiting discrimination in employment based on pregnancy, in accord with the [EEOC] guidelines." H.R. REP. NO. 95-948, at 2 (1978).

[16] *See, e.g., Badih v. Myers*, 43 Cal. Rptr. 2d 229, 232-33 (Cal. Ct. App. 1995); *Michigan Dep't of Civil Rights ex rel. Jones v. Michigan Dep't of Civil Serv.*, 301 N.W.2d 12, 16 (Mich. Ct. App. 1980); *Minnesota Min. and Mfg. Co. v. State*, 289 N.W.2d 396, 398-99 (Minn. 1979); *Castellano v. Linden Bd. of Ed.*, 400 A.2d 1182 (N.J. 1979); *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 86-88 (1976); *W. Middlesex Area Sch. Dist. v. Comm'r, Penn. Human Relations Comm'n*, 394 A.2d 1301, 1303 (Pa. Commw. Ct. 1978); *Ray-O-Vac, Div. of E.S.B, Inc. v. Wisconsin Dep't of Industry, Labor and Human Relations*, 236 N.W.2d 209, 215 (Wis. 1975).

[17] Moreover, under the court of appeals' interpretation, those who have already retired without filing charges of discrimination within 300 or 180 days of the setting of their pensions are precluded from seeking relief now. *See* Pet. App. 20a-22a.

Third, the financial consequences of nondiscriminatory pension treatment in this context are predictably modest. In most cases, the amount of service at issue is a few weeks or months in a career long enough for a pension to vest. Moreover, the difference in service credits would have little or no financial consequence for employers with pension formulas that round workers' terms of employment to the nearest year or month.[18] And the modest cost of equal treatment would be spread out over many years, as eligible women retire.

Thus, while the difference is significant to women living on fixed incomes, there is no reason to think that the price of that equality is more than pension plans can bear.

Fourth and finally, the PDA did little to disrupt settled expectations because, at most, the PDA "merely reestablish[ed] the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts . . . ." H.R. REP. NO. 95-948, at 8 (1978). And to the extent that *Gilbert* may have given AT&T reason to think that it could save money by reducing pensions, that message was short lived – Congress proposed legislation to overrule *Gilbert* three months after the decision and passed it less than two years later. *See* H.R. REP. NO. 95-948 at 4 (1978). That legislation has been on the books for more than thirty years, giving employers ample opportunity to prepare to meet its requirements as they begin to set the

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[18] *See, e.g.*, The Kansas Public Employees Retirement System Website, http://kpers.orgretirementkcj.htm#unreduced.

pensions of women who took pregnancy leave before its enactment.[19]

B. The PDA Did Not Change The Law As It Relates To AT&T's Conduct.

In any event, AT&T's retroactivity objection fails for the additional reason that it is based on the false premise that prior to the enactment of the PDA, Title VII permitted employers to discriminate on the basis of pregnancy with respect to seniority accrual. *See* Petr. Br. 16-18.

1. In *Gilbert*, this Court held that the denial of disability benefits to women on pregnancy leave did not violate Title VII. 429 U.S. at 145-46. Such discrimination, the Court held, was not disparate treatment on the basis of sex. *Id.* at 136. The Court acknowledged, however, that pregnancy discrimination might be shown to have an unlawful disparate impact on women, although no such showing was made in the case before it. *Id.* at 135.

One year later, this Court held in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), that a "policy of denying accumulated seniority to female employees returning from pregnancy leave" has such an illegal disparate impact. *Id.* at 139. In that case, an employee lost her accumulated seniority upon taking pregnancy leave. Upon her return, she was given a temporary position but was unable to obtain

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[19] The law has been particularly clear in the Ninth Circuit for more than seventeen years, since AT&T's predecessor-in-interest, Pacific Bell, lost its appeal in *Pallas* in 1991. *See Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert denied*, 502 U.S. 1050 (1992).

permanent employment because of her lack of seniority. *Id.* at 139. This Court held that the employer's policy of denying accumulated seniority to women returning from pregnancy leave – which was the cause of Satty's termination – violated Title VII. *Id.* at 143.

The Court first distinguished *Gilbert*, explaining that its refusal to find a disparate impact in that case turned on the fact that "[n]o evidence was produced to suggest that men received more benefits from General Electric's disability insurance fund than did women." *Id.* at 141. In contrast, the employer in *Satty* did not "merely refuse[] to extend to women a benefit that men cannot and do not receive, but [rather] imposed on women a substantial burden that men need not suffer." *Id.* at 142. That burden, the Court explained, was the deprivation "of employment opportunities" that flows from the loss of accumulated seniority. *Id.* Nothing in *Gilbert*, the Court concluded, would allow the Court to read Title VII "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.* Because the employer's seniority policy had a disparate impact on women, and because "there was no proof of any business necessity adduced with respect to the policies in question," the Court held the policy unlawful under Title VII. *Id.* at 143.

In enacting the PDA in 1978, Congress codified the result in *Satty* by prohibiting pregnancy-based discrimination in the administration of seniority systems and the payment of fringe benefits. At the same time, this Court has explained, Congress "not only overturned the specific holding in [*Gilbert*], but also rejected the test of discrimination employed by

the Court in that case." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983).

2. There can be no assertion that the *holding* of *Gilbert* controls this case. Respondents do not challenge the denial of disability benefits. Instead, they assert that AT&T violated Title VII by setting pensions in reliance upon a seniority system that denies equal seniority credit for pregnancy leave. That question is more directly addressed by the Court's decision in *Satty*.

AT&T asserts that *Satty* is inapplicable because "an award of service credit or seniority is indisputably a 'benefit.'" Petr. Br. 23. But this Court necessarily rejected that claim in *Satty*, holding that the withdrawal of seniority credits is not simply the denial of a benefit, but rather an action that deprives women "of employment opportunities because of their different role." 434 U.S. at 142. And although *Satty* involved the denial of accumulated seniority, the denial of the right to accumulate seniority has the same effect – it does more than simply deny women a special benefit relating to pregnancy; it can "deprive them 'of employment opportunities' and . . . 'adversely affect [their] status as an employee.'" *Id.* at 141. Whether seniority credits are withheld or taken away, the discrimination can deny a woman "specific employment opportunities that she otherwise would have obtained," including in some cases, the "attendant relegation to less desirable and lower paying jobs, for the remainder of her career." *Id.* Moreover, both the denial of the right to keep, and to

accumulate, seniority credit can have an impact on forms of compensation, including pensions.[20]

3. In addition, AT&T's request that this Court extend the rationale of *Gilbert* beyond its holding is precluded by *Newport News*. In that case, the Court considered whether Title VII permitted an employer-provided insurance plan to exclude pregnancy coverage for the wives of male employees. The PDA itself addresses only pregnancy discrimination against employees; it is silent as to pregnancy discrimination against workers' spouses. *See* 42 U.S.C. § 2000e(k); *Newport News*, 462 U.S. at 687-88 (Rehnquist, J., dissenting). Accordingly, the question before the Court was not whether the PDA prohibited the employer's conduct, but whether Title VII's pre-existing prohibition against sex discrimination permitted such a policy. *See Newport News*, 462 U.S. at 675-76. Thus, the Court was faced with the same basic question posed here – whether the rationale of *Gilbert* should be applied to construe Title VII's general, pre-PDA proscription against sex discrimination.

This Court held that it should not. *Newport News*, 462 U.S. at 676. Although the Court recognized that the PDA did not, on its own terms, apply to the case before it, the Court noted that the PDA unambiguously reflected Congress's rejection of

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[20] This does not mean that the discriminatory denial of service credits is immediately challengeable. *See supra* 30-36. *Satty* did not discuss when the claim for unlawful seniority discrimination accrues. And, in fact, the employee in *Satty* did not file her charge of discrimination until her lost seniority prevented her from obtaining a permanent position upon returning from leave. 434 U.S. at 139.

both the holding and rationale of *Gilbert*. *Id.* at 678-79. For that reason, it declined to extend *Gilbert*'s test for disparate treatment outside the facts of that case. *Id.* at 684-85. As then-Justice Rehnquist observed in dissent, the decision reflected that, as a practical matter, "the Court ... is now overruling *Gilbert*." *Id.* at 686.

C. The Court Of Appeals Properly Construed The PDA.

Other than complaining that the court of appeals' decision gives the PDA an impermissible retroactive effect, AT&T offers no other objection to the court's conclusion that Title VII as amended precludes discriminating against pre-PDA leave-takers in making post-PDA benefit decisions. *See* Petr. Br. 20-21. Accordingly, if the Court rejects AT&T's retroactivity challenge, the Court may accept, without deciding, that the PDA does in fact apply to prohibit that reliance.

In any event, even if AT&T were allowed to advance new objections to the court of appeals' reading of the statute for the first time in its reply brief, any such objection would be unfounded.

1. The text of the PDA expressly reaches AT&T's pension-setting decisions. In commanding that women affected by pregnancy "shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k), Congress could not have been clearer that all post-enactment benefit decisions must ensure equal treatment regardless of pregnancy. The only basis the statute provides for unequal treatment is

differences in workers' "ability or inability to work," leaving no room for any argument that the Act nonetheless permits distinctions between those who took leave before and after the PDA's effective date.

2. The purpose and legislative history of the PDA support this reading.

Congress was painfully aware of the hardships visited upon American families when women who took pregnancy disability leave were financially disadvantaged as a result. *See, e.g.*, S. REP. NO. 95-331, at 9 (1977). The focus of the legislation – as reflected in its text – was upon ensuring equal "receipt of benefits" by workers "similar in their ability or inability to work," factors upon which the date of pregnancy leave has no bearing.

The legislative history also demonstrates that Congress believed that, as applied to discriminatory denial of service credit, the PDA simply codified existing law as established by this Court's decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Thus, the House Report explained that:

> Regarding seniority, the Supreme Court recently held in the *Satty* case that *denying seniority to absent pregnant employees during leave* as well as denying competitive seniority for job bidding when they return, does impose a substantial burden on women and is therefore prohibited by Title VII.

H.R. REP. NO. 95-948, at 6 (1978) (emphasis added). As discussed above, that understanding of *Satty* was well-founded. *See infra* 44-48. But for present purposes, it is enough that Congress believed (rightly or wrongly) that it was simply codifying pre-existing law in this context. Given that understanding, Congress would have had every expectation that the

PDA would not exempt from protection employees who took pregnancy leave before the PDA was enacted.

3. The fact that Congress delayed implementation of the PDA, as it applied to fringe benefit payments, does not undermine the court of appeals' conclusion. That delay simply reflected Congress's recognition that this Court's decision in *Gilbert* had relieved employers of the obligation to pay equal disability benefits and drew into question their obligation of equal treatment in other fringe benefit programs as well. *See* H.R. REP. NO. 95-948, at 3 (1978). The delay was intended simply to give employers time to adjust their practices; it did not reflect any intent to permanently disentitle women who took pre-PDA pregnancy leave from equal benefit treatment.

Indeed, as noted above, the legislative history makes clear that Congress believed that discrimination with respect to seniority accrual had always been unlawful under Title VII and, for that reason, the delay of the implementation of the PDA's fringe benefit provision did not displace employers' pre-existing obligation to allow women on pregnancy leave to accrue service credits at the same rate as other similarly situated workers. The House Report explains that "Section 2(a) provides for an immediate effective date insofar as the bill affects employment policies other than fringe benefits, including . . . denying seniority." *See* H.R. REP. NO. 95-948, at 8. "Many, if not all such policies," the report explained, were "presumably invalid under present law as interpreted by *Satty*." *Id.*

If anything, the delayed implementation date in Section 2(a) undermines AT&T's construction of the

Act. It demonstrates that Congress was aware that guaranteeing equal benefit treatment would impose costs that employers may not have been planning to bear after the Court's decision in *Gilbert*. But Congress did not respond to that fact by grandfathering established discriminatory practices or by phasing in the Act to apply only to those hired after its enactment. Instead, Congress gave employers 180 days to adjust their policies and budgets. When those 180 days expired thirty years ago, AT&T lost any ground it could have had for denying equal pensions to retiring workers.

IV. AT&T's Discriminatory Seniority Policy Is Not Immunized From Challenge By Section 703(h).

AT&T's reliance on Section 703(h) is misplaced because that provision does not protect a facially discriminatory seniority system like AT&T's and because, in any event, the provision does not apply to claims of pregnancy discrimination in fringe benefit programs.

1. AT&T acknowledges that Section 703(h) does not protect a facially discriminatory seniority system. *See* Petr. Br. 3; *see also United Air Lines, Inc. v. Evans*, 431 U.S. 553, 560 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 760 n.16 (1976); *cf. TWA, Inc. v. Thurston*, 469 U.S. 111, 124-25 (1985) (same for parallel provision of Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2)). And as

described above, AT&T's seniority system is facially discriminatory.[21]

2. In any event, Section 703(h) does not apply to claims of fringe benefit discrimination under the PDA.

The language of the PDA is clear: "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . and *nothing in section [703(h)] of this title shall be interpreted to permit otherwise.*" 42 U.S.C. § 2000e(k) (emphasis added).[22] In this case, AT&T argues that even if it is otherwise guilty of violating this requirement of equal fringe benefit treatment, the Court should interpret Section 703(h) "to permit otherwise." That request simply cannot be squared with the plain language of the statute.

AT&T points to what it says is equally emphatic language in Section 703(h), stating that the provision provides a defense "notwithstanding any other provision of this subchapter." Petr. Br. 49 (citing 42 U.S.C. § 2000e-2(h)). But at most, this establishes a textual conflict between Section 703(h) and the PDA.

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[21] The Solicitor General's reliance (U.S. Br. 20 n.5) on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), is misplaced. That decision makes clear that a seniority system may be "bona fide" even if it perpetuates past discrimination. But it does not hold that a seniority system like AT&T's, the rules of which are facially discriminatory, is protected from challenge under Section 703(h).

[22] Because this case involves fringe benefit discrimination, the Court need not decide whether the PDA excludes reliance on Section 703(h) in cases involving other forms of pregnancy discrimination (such as refusal to hire).

And this Court's decisions are clear that any such conflict must be resolved in favor of the more recent, and more specific mandate of the PDA, which directly addresses the applicability of Section 703(h). *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (A "'specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.'") (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)).

AT&T delves into the legislative history in an attempt to show that Congress did not really mean what it said. But because the language of the PDA is unambiguous, there is no need to turn to the legislative history to aid in its interpretation. That history, moreover, does not support a counter-textual reading of the statute. To be sure, the legislative history reflects that Congress was concerned that courts not read the language in Section 703(h), arising from the Bennett Amendment, as an excuse for allowing pregnancy discrimination. Petr. Br. 52-53. But Congress plainly responded to that concern by enacting a provision that made the entirety of Section 703(h) – not simply its last sentence – inapplicable. *See* 42 U.S.C. § 2000e(k).

That decision was understandable. An employer can comply with the PDA's requirement of equal fringe benefit treatment without disrupting the settled expectations of other workers, the principal evil at which Section 703(h) is aimed. *See, e.g.*, *Bowman Transp. Co.*, 424 U.S. at 758-62 (describing purposes of provision); *id.* at 773 & n.33 (noting that the concern about interfering with the interests of other employees "has no application" with respect to awards of "pension benefits").

V. Respondents' View Is Consistent With The Interpretation Given Title VII By The Agency Charged With Its Enforcement.

Lest there be any doubt concerning the proper resolution of this case, the court of appeals' decision also comports with the long-held and consistent views of the EEOC, the agency Congress tasked with the administration and enforcement of Title VII and the PDA. As the agency entrusted by Congress to enforce Title VII, the Commission's views are entitled to respect. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991).

Shortly after Title VII's enactment in 1964, the EEOC issued Guidelines providing that "employment policies and practices involving matters such as . . . *the accrual of seniority* and other benefits and privileges . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disability." 29 C.F.R. § 1604.10 (1973).[23]

When Congress enacted the PDA, the Commission again issued Guidance reiterating its view that Title VII had always prohibited pregnancy discrimination with respect to seniority. The

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[23] This Court declined to defer to these regulations in *Gilbert* to the extent they addressed denial of equal disability benefits because they conflicted with other guidance the Commission and the Department of Labor had issued on that question. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976). However, no such conflict exists with respect to seniority discrimination. And, in fact, this Court relied on this regulation as applied to the denial of accumulated seniority in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977).

Guidance explained that to "the extent that Title VII already required employers to treat persons affected by pregnancy-related conditions the same as persons affected by other medical conditions, the Act does not change employee rights." Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604, App. (1978) (Answer to Question 1). "For example," the Commission continued, "Title VII has always prohibited an employer . . . from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves." *Id.* As a result, although the effective date of the PDA was postponed "[w]ith respect to payment of benefits," the Commission took the view that "[w]ith respect to all aspects of sick leave policy other than payment of benefits, such as the terms governing retention and accrual of seniority . . . equality of treatment was required by Title VII without the Amendment." *Id.* (Answer to Question 2).

The Commission's current Compliance Manual continues to provide that "employers must treat pregnancy-related leaves the same as other medical leaves in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement." EEOC Compliance Manual, ch. 3, Employee Benefits, Title VII/EPA Issues III.B (Oct. 3, 2000). And consistent with its long-held view that Title VII contained this requirement even before the PDA, the Commission has explained that "[t]hese principles also apply to pregnancy-related leaves taken before the effective date of the PDA, where an employer uses years of service to establish eligibility for retirement benefits." *Id.* The Manual proceeds to give an example materially indistinguishable from this case,

and instructs that the employee's "claim is timely and states a violation of the PDA." *Id.*[24]

The Commission has acted upon that position in litigation,[25] repeatedly suing employers for administering seniority and pension policies indistinguishable from AT&T's, *see AT&T v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001) (collecting cases), and filing amicus briefs supporting private litigants advancing the same claims, *see id.*, including in this case, *see* J.A. 121-46.

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[24] In the course of explaining that the employer in the example engaged in a present violation of Title VII, the Manual assumes in passing that the "denial of service credit to women on maternity leave was not unlawful" when the leave was taken. *Id.* That position is consistent with respondents' view that the discriminatory denial of service credits, standing alone, does not violate Title VII. In any case, it should not be read to cast doubt on the Commission's prior, and long-standing, view that even before the PDA, Title VII prohibited pregnancy discrimination in the administration of seniority systems.

[25] The fact that the Commission has not filed or signed on to a brief in this Court does not cast doubt on its position. *See Smith v. City of Jackson*, 544 U.S. 228, 243-45 (2005) (Scalia, J., concurring) (deferring to EEOC position even though Commission did not file brief). Although employees of the Commission may have decided to make no recommendation to the Solicitor General, see U.S. Br. 9 n.1, there is no indication that the Commission itself was consulted or that it has taken any action to reconsider the position it continues to hold out to the public in its regulations and Compliance Manual. (The records of the meetings for the Commission, which reflect no such consultation or consideration, are available at http://www.eeoc.gov/abouteeoc/meetings/index.html).

As described above, that view comports with the plain reading of the text of the statute, as well as the manifest purposes of Title VII and the PDA.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, sitting en banc, should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

FEDERAL STATUTES

Title VII of the Civil Rights Act of 1964 provides, in relevant part:

42 U.S.C. § 2000e: Definitions

* * * *

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

* * * *

[Note] Effective Date of 1978 Amendment; Exceptions to Application

Section 2 of Pub. L. 95-555, 92 Stat. 2077, provides that:

(a) Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.

(b) The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act. . . .

Approved October 31, 1978.

* * * *

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if

such differentiation is authorized by the provisions of section 206(d) of title 29.

* * * *

42 U.S.C. § 2000e-5. Enforcement provisions

* * * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such

charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

* * * *

FEDERAL REGULATIONS

29 C.F.R. § 1604.10(b) (1973), provides, in relevant part:

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 App. (1978), provides, in relevant part:

1. Q. What is the effective date of the Pregnancy Discrimination Act?

A. The Act became effective on October 31, 1978, except that with respect to fringe benefit programs in effect on that date, the Act will take effect 180 days thereafter, that is, April 29, 1979.

To the extent that Title VII already required employers to treat persons affected by pregnancy-

related conditions the same as persons affected by other medical conditions, the Act does not change employee rights arising prior to October 31, 1978, or April 29, 1979. Most employment practices relating to pregnancy, childbirth and related conditions--whether concerning fringe benefits or other practices--were already controlled by Title VII prior to this Act. For example, Title VII has always prohibited an employer from firing, or refusing to hire or promote, a woman because of pregnancy or related conditions, and from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves.

2. Q. If an employer had a sick leave policy in effect on October 31, 1978, by what date must the employer bring its policy into compliance with the Act?

A. With respect to payment of benefits, an employer has until April 29, 1979, to bring into compliance any fringe benefit or insurance program, including a sick leave policy, which was in effect on October 31, 1978. However, any such policy or program created after October 31, 1978, must be in compliance when created.

With respect to all aspects of sick leave policy other than payment of benefits, such as the terms governing retention and accrual of seniority, credit for vacation, and resumption of former job on return from sick leave, equality of treatment was required by Title VII without the Amendment.

COMPLIANCE MANUAL

EEOC Compliance Manual, ch. 3, Employee Benefits, Title VII/EPA Issues III.B (Oct. 3, 2000), provides in relevant part:

Employers must allow women who are on pregnancy-related leaves to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy. Thus, if an employer allows employees who take medical leave to retain their accumulated seniority and to accrue additional service credit during their leaves, the employer must accord the same treatment to women on pregnancy-related leaves. Similarly, employers must treat pregnancy-related leaves the same as other medical leaves in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement.

These principles also apply to pregnancy-related leaves taken before the effective date of the PDA, where an employer uses years of service to establish eligibility for retirement benefits.

EXAMPLE - CP took maternity leave in 1975, before passage of the PDA. At the time, her employer's policy denied any accrual of service credit during maternity leaves, although it permitted employees on leave for other medical reasons to accrue service credit during their leaves. Although the employer changed its policy in 1979 to conform to the PDA and to treat maternity leave similarly to other medical leaves, it never gave CP credit for her pre-PDA leave.

In 1996, CP's employer implements an incentive program that authorizes employees with 25 or more years of service to take early retirement with full pensions. Because she took a maternity leave for which she accrued no years of service credit, CP falls short of the 25 year service requirement and files a charge challenging discrimination on the basis of pregnancy.

CP's claim is timely and states a violation of the PDA. In evaluating eligibility for early retirement in 1996, the employer has distinguished between employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities. While the denial of service credit to women on maternity leave was not unlawful when CP took her leave in 1979, the employer's decision to incorporate that denial of service credit in calculating seniority in 1996 is discriminatory.

REPLY BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Prior to the Pregnancy Discrimination Act of 1978 ("PDA"), AT&T's personnel policies classified pregnancy leave as personal leave, not temporary disability leave. AT&T's Net Credited Service ("NCS") system, in turn, awarded full service credit, or seniority, for temporary disability leave, but only 30 days service credit for personal leave. As a result, women who took pregnancy leaves did not receive full service credit, and their NCS dates were adjusted accordingly. When the PDA took effect, AT&T abolished its pregnancy leave policies, but continued to rely on its lawful (and in any event unchallenged) pre-PDA NCS date adjustments when calculating pension benefits.

The Ninth Circuit's conclusion that this reliance violates Title VII is plainly wrong. First, that ruling necessarily gave the PDA retroactive effect. Second, even if AT&T's earlier service credit awards had been unlawful, the limitations period for challenging them expired decades ago, and this Court has repeatedly held that Title VII is not violated anew when an employer gives present effect to stale acts of discrimination. Finally, § 703(h) of Title VII codifies this principle where, as here, past acts of discrimination are given present effect through an otherwise lawful seniority system.

Respondents make two central arguments in response. They repeatedly claim that the NCS system is "facially discriminatory." Relatedly, they claim that AT&T's pre-PDA denial of full service credit for pregnancy leaves was not immediately actionable, and could be challenged only when it caused the concrete harm of reduced pension awards

decades later. As AT&T explains, both assertions are wrong.

I. THE NCS SYSTEM IS NOT FACIALLY DISCRIMINATORY.

As AT&T demonstrated, its NCS system is facially neutral, as it awards seniority to men and women on an identical basis. Respondents have failed to show otherwise.

A. AT&T's Pre-PDA Leave Policies Were Not Seniority Accrual Rules.

Respondents baldly assert that AT&T's pre-PDA pregnancy leave policies were NCS seniority accrual rules and those leave policies rendered that system facially discriminatory. Br. 17-18. This is incorrect. The NCS accrual rule tied service credit to whether leave was classified as paid disability or personal. See JA 47 n.2. ("employees on paid disability leave received full service credit for the period of their disability absence; employees on personal leaves of absence ... received a maximum of thirty days service credit.").[1] But it was AT&T's personnel policies that determined how leaves, including pregnancy leave, were classified. *Id.* ("the *disability policies* of AT&T"—not the NCS system—"did not treat pregnancy as a disability") (emphasis added); see also *Pallas v. Pacific Bell*, 940 F.2d 1324, 1326 (9th Cir. 1991) (Pacific Bell "required employees disabled by pregnancy to take personal leaves"). The

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[1] *See also* Pet. App. 4a (employees "on personal leave received a maximum of thirty days NCS credit, whereas there was no limit on the amount of NCS credit for employees on temporary disability leave"); *Pallas* v. *Pacific Bell*, 940 F.2d 1324, 1326 (9th Cir. 1991) (under the NCS system, "an employee receives credit for . . . absen[ce] due to a temporary disability, but does not receive [full] credit for time spent on personal leave").

Maternity Payment Plan that operated between August 7, 1977 and the PDA's effective date confirms this. AT&T did not change the NCS accrual rules to accord women greater service credit for pregnancy leaves during this period; it changed the classification of the leave, providing that pregnant women "were eligible for disability benefits for up to six weeks of leave." JA 48.[2]

AT&T's leave policies indisputably operated outside the NCS system. They established when employees could miss work for an extended period without ceasing their employment, and which extended absences would be paid or unpaid. That they had "some nexus" to AT&T's seniority system did not make them accrual rules. *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 608 (1980).

Indeed, the discriminatory no-marriage rule at issue in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), had the same nexus to United's seniority system that AT&T's pre-PDA leave policy had to the NCS system. The no-marriage rule was a personnel policy that had an inescapable effect on seniority: it forced female employees to resign if they married, which in turn caused a forfeiture of accrued seniority under United's neutral seniority rules. But this nexus did not make the no-marriage rule part of United's seniority system; if it had, the Court could not have deemed that seniority system non-

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[2] AT&T never conceded, Resp. Br. 17-18, that the pre-PDA leave policies were NCS accrual rules. *See* Ptr. Br. 5 (AT&T's classification of pregnancy leaves "as personal leaves, not as disability leaves" was "significant because NCS adjustments were handled differently for these categories of leave"); *id.* at 31 ("the NCS system recognized 30 days service credit for *all* personal leave," whether or not pregnancy-related) (emphasis added).

discriminatory. *Id.* at 557-58. So too here, AT&T's pre-PDA personnel policies treated pregnancy as unpaid personal leave, and this classification affected service credit under the NCS system's distinct accrual rules. But this did not render those policies part of the NCS system.

Thus, the NCS system is facially neutral in the same way United's seniority system was. United's system deprived both men and women of accrued seniority if they resigned, regardless of the reason for the resignation and whether it was compelled by a discriminatory policy. The NCS system denies full service credit to both men and women who take personal leave, regardless of the reason for the leave and whether it was compelled by a policy that drew pregnancy-based distinctions.

In short, because AT&T's pre-PDA policies were not part of the NCS system, they could not have rendered the NCS system "facially discriminatory."

B. AT&T's Pre-PDA Leave Policies Were Lawful.

AT&T's pre-PDA pregnancy leave policies were not only independent of the NCS system, they were lawful. Respondents claim, Br. 44-47, that the pre-PDA leave policies *might* have violated Title VII under a disparate impact theory that they never asserted. This claim is mistaken.

In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the United States challenged the exclusion of pregnancy from a benefits package on a disparate impact theory. It explained that the exclusion subjected women "to a substantial risk of total loss of income because of temporary medical disability," and argued that, even if the policy was "regarded as a sexually 'neutral' policy," this adverse effect made out

a *prima facie* violation. Br. of United States 12, 16-17, *Gilbert*, 429 U.S. 125. This Court rejected that theory. It deemed the adverse impact from "not receiv[ing] benefits" *legally insufficient to establish a disparate impact*, and instead required evidence that the total benefits package was "worth more to men than to women." *Gilbert*, 429 U.S. at 138.

By contrast, in *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), the Court held that a policy "of *denying accumulated [i.e., previously earned] seniority* to female employees returning from pregnancy leave violates . . . Title VII" under a disparate impact theory. *Id.* at 139 (emphasis added). Stressing that "[t]he distinction between benefits and burdens is more than one of semantics," the Court concluded that the policy in *Satty* imposed a "substantial burden" on women and thus was unlawful on disparate impact grounds. *Id.* at 141-42.

Being awarded seniority during an extended absence from work is a benefit just like receiving wages, disability pay or insurance coverage during such an absence is a benefit. Thus, a denial of the *benefit* of full service credit did not cause the type of *burden Satty* deemed actionable. Indeed, *Satty* itself made this clear: the policy in that case also did not award seniority for time on pregnancy leave, but the Court did not mention that aspect of the policy when explaining why plaintiffs had established a disparate impact. See *id.* at 141 ("petitioner's policy of *depriving employees* returning from pregnancy leave *of their accumulated seniority* acts both to deprive them 'of employment opportunities' and to 'adversely affect [their] status as [employees]'"). This same distinction explains why the Court did not "h[o]ld" a petition for a writ of certiorari involving a challenge to AT&T's pre-PDA leave policy pending its review of

the *Satty* decision, and instead vacated a decision permitting a Title VII challenge to that policy in light of *Gilbert*. Ptr. Br. 23 n.7. It also explains why the EEOC itself has conceded that, before the PDA, "'the denial of service credit to women on maternity leave was not unlawful,'" JA 146, and why several circuit courts reached the same conclusion in light of *Gilbert* and *Satty*. See Ptr. Br. 17 (citing cases).

Because AT&T's pre-PDA leave policies were lawful when used, they could not have rendered the *post-PDA* NCS system "facially discriminatory."

C. AT&T's Pre-PDA Leave Policies Were Facially Neutral As A Matter Of Law, And Became Inoperative When The PDA Took Effect.

Even if AT&T's pre-PDA leave policies were NCS system rules and could have been deemed illegal, respondents' facial discrimination claim still fails. First, even under respondents' reading of *Gilbert* and *Satty*, AT&T's pre-PDA leave policies could only have been unlawful under a disparate impact claim. The very premise of such a claim is that a policy is "*neutral on [its] face* but ha[s] a discriminatory effect." *Satty*, 434 U.S. at 141 (emphasis added). Thus, pre-PDA policies that, as a matter of law, were *facially neutral* when used could not render the post-PDA NCS system *facially discriminatory*. Second, the policies were abolished on the PDA's effective date. Thus, the post-PDA NCS system was not facially discriminatory.

1. AT&T's pre-PDA leave policies were facially neutral as a matter of law.

Prior to the PDA, *Gilbert* expressly held that a pregnancy-based distinction was "not a gender-based

discrimination at all." 429 U.S. at 136.[3] Thus, even if subject to challenge on disparate impact grounds, facially neutral pre-PDA policies could not render the post-PDA NCS system facially discriminatory. Recognizing this, respondents try to show that, notwithstanding *Gilbert*, AT&T's pre-PDA leave policies were facially discriminatory before the PDA. They argue that (1) *Gilbert* is limited to its precise facts, and (2) after the PDA, this Court held that pregnancy-based distinctions constituted facial gender discrimination under Title VII's original text. Br. 47-48 (citing *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983)). This attempt to spin pre-PDA straw into pre-PDA gold is baseless.

First, respondents ignore *Satty*, which held that a policy denying seniority accruals for pregnancy leaves was "not on its face a discriminatory policy." 434 U.S. 140. Thus, it is not necessary to "extend the rationale of *Gilbert* beyond its holding," Resp. Br. 47, to conclude that AT&T's pre-PDA leave policies were facially neutral. *Satty* incontestably establishes that fact.

Second, *Newport News* did not rest its finding of facial discrimination solely on the pre-PDA text of Title VII. *Id.* The question presented there was whether an insurance plan "complie[d] with the *amended* statute." 462 U.S. at 671 (emphasis added). The Court considered "whether Congress, *by enacting the [PDA]*, . . . rejected the test of discrimination employed by the Court in" *Gilbert*, *id.* at 676

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[3] By repeatedly quoting this holding and arguing that its pre-PDA leave policies were *lawful*, Ptr. Br. 16-17, 22-23, AT&T plainly disputed that its policies were facially discriminatory. Respondents' contrary claim, Br. 18, is inexplicable.

(emphasis added), then reviewed "the *terms of the amended statute* to decide whether petitioner has unlawfully discriminated," *id.* at 682 (emphasis added). The Court held that "*[t]he 1978 Act makes clear* that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Id.* at 684 (emphasis added).

Thus, *Satty* establishes that pre-PDA policies affecting seniority accruals during pregnancy leave were facially neutral; and *Newport News* casts no doubt on that conclusion, because it relied on the *amended* text of Title VII. Use of facially neutral leave policies prior to April 1979 could not have rendered the NCS system facially discriminatory in the 1990s.

2. AT&T's pre-PDA leave policies were abolished before the PDA took effect.

Respondents' claim of facial discrimination also fails because AT&T abolished its pre-PDA leave policies before the PDA took effect. Since then, the NCS system has simply given effect to NCS dates that were adjusted when the pre-PDA leave policies were used. *Evans* and its progeny make clear that this is not a new Title VII violation.

To show otherwise, respondents try to equate this case with *Bazemore*. There, a state employer had used a pay structure prior to 1965 in which salaries for black workers were "intentionally and quite openly simply set lower than those of white colleagues in the same employment positions." *Bazemore* v. *Friday*, 751 F.2d 662, 690 (4th Cir. 1984) (Phillips, J., concurring in part, dissenting in part).[4]

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[4] This Court has recognized that Judge Phillips' opinion set forth the controlling description of the *Bazemore* facts in

In 1965, the state began paying all new hires the same salaries, regardless of race, *id.*, and applied a pay-setting rule whereby each worker's salary was based on his or her prior year's salary, plus a race-neutral raise. Resp. Br. 19. Respondents claim that this Court deemed the new pay structure unlawful "because it *relied on* the pre-Act discriminatory base salaries." *Id.* (emphasis added). Respondents argue that the NCS system is discriminatory in the same way, "because it relies upon a facially discriminatory measure of service." *Id.* at 20.

These misleading descriptions cannot obscure the fundamental differences between this case and *Bazemore*. The state did not abolish its discriminatory pay structure for pre-1965 hires, then simply give present effect to completed acts of past discrimination. Rather, it *continued to use an openly discriminatory pay scale*. While respondents focus on the neutral raises, the state was still using openly discriminatory base salaries for pre-1965 hires after Title VII had outlawed discrimination in pay. *Bazemore*, 751 F.2d at 694 ("pre-1965 *overt discrimination in salary continued*" after Title VII was extended to states) (emphasis added); *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2174 n.6 (2007) (the state's conduct was the "'*continued use of a racially explicit base wage*'") (emphasis added) (quoting Petitioner's Br. 33, *Bazemore*, 478 U.S. 385); *id.* at 2173 (pay structure in *Bazemore* was "'*a mere continuation of the pre-1965 discriminatory pay structure*'").

This is why this Court deemed the violation of Title VII "obvious." *Bazemore* v. *Friday*, 478 U.S. 385, 395

Ledbetter v. *Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2173 n.5 (2007).

(1986) (Brennan, J., concurring, joined by all other Justices).

> A pattern or practice [*i.e.*, paying blacks less than whites for the same work] that would have constituted a violation of Title VII, but for the fact that the statute had not become effective, became a violation upon Title VII's effective date, and to the extent that an employer *continued to engage in that act or practice*, it is liable under that statute.

Id. (emphasis added). See also *Ledbetter*, 127 S.Ct. at 2173 (discussing *Bazemore* and observing that "an employer [that] adopts a facially discriminatory pay structure" and then "intentionally *retains* such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure *is used*") (emphases added). The wrongful "perpetuat[ion]" of discrimination in *Bazemore*, 478 U.S. at 395, therefore, did not rest on current effects of past acts of discrimination. Indeed, the Court stressed that its "holding in no sense gives legal effect to the pre-1972 actions, but, consistent with *Evans* . . . focuses on the *present* salary structure, which is illegal if it is a mere *continuation* of the pre-1965 discriminatory pay structure." *Id.* at 396 n.6 (emphases added).

AT&T, by contrast, did not continue to use its pre-PDA leave policies after the PDA outlawed them. After the PDA's effective date, AT&T treated pregnancy the same as other temporary disabilities and awarded full service credit for pregnancy leaves. And respondents nowhere challenge AT&T's showing that it does not currently use its pre-PDA leave policies to calculate benefits for women who took pre-PDA pregnancy leaves, as the lower court mistakenly and improperly claimed. Ptr. Br. 26-29.

Nevertheless, respondents equate AT&T's abolition of its pre-PDA leave policies with the state's act in *Bazemore* of "abandon[ing] . . . its pre-Act policy of giving blacks lower starting wages and pay raises," an act that was "not sufficient to render its pay structure nondiscriminatory." Br. 24. But the state's action vis-à-vis new hires was insufficient in *Bazemore* because the state continued, after it became subject to Title VII, to pay pre-1965 hires openly discriminatory salaries. Here, AT&T did not abolish the pre-PDA leave policies just for women hired after the PDA took effect, but for all women.[5]

Nor does the post-PDA NCS system rely "upon a facially discriminatory measure of service." Resp. Br. 20. The measure of service in the NCS system is term of employment ("TOE"). JA 38-39. Respondents nowhere dispute that TOEs are facially neutral: they are calculated based on the difference between a facially neutral NCS date and a facially neutral date of retirement.

Thus, what respondents describe as "a facially discriminatory measure of service" is in fact a facially neutral TOE that respondents believe is infected with discrimination, because it was calculated using an NCS date adjusted as a result of AT&T's pre-PDA leave policies. This is simply a claim that the NCS system gives present effect to pre-PDA actions. Respondents argue that the NCS system "discriminate[s]" by "setting pensions using a measure of service that gives those women [who took pre-PDA pregnancy leaves] less credit for the same time served

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[5] Accordingly, respondents' example of a company that barred women from its gym starting in 1960 and either left that policy in place after Title VII took effect, or changed it to bar only women hired before 1964, Br. 26, is inapposite.

simply because they took pregnancy leave rather than other forms of temporary disability leave." Br. 22. But again, this is just a different way of saying that AT&T "discriminates" by allowing "precharging period discrimination [to] adversely affect[] the calculation of a neutral factor ([*i.e.*,] seniority) that is used in determining [pension benefits]." *Ledbetter*, 127 S.Ct. at 2174. And that claim is both meritless and time-barred.

Indeed, the claim this Court rejected in *Evans* could have been stated in the same terms respondents use. Some employees "with less total service than [Evans] ha[d] more seniority than she" because she had resigned under an illegally discriminatory policy. *Evans*, 431 U.S. at 557. Thus, like respondents here, Evans could have argued that United was discriminating against her by "using a measure of service that gives . . . women less credit for the same [or even more] time served simply because they" were forced to resign due to marriage. Br. 22. This verbal formulation, however, does not change the underlying reality: Evans, like respondents here, alleged that a "seniority system g[ave] present effect to [a] past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination." *Evans*, 431 U.S. at 557. That claim failed in *Evans*, and must fail here as well.[6]

At bottom, "all [respondents] ha[ve] alleged is that [AT&T] discriminated against [them] . . . in the past

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[6] *Evans* cannot be distinguished on the ground that United's marriage rule operated "entirely outside" a neutral seniority system. Resp. Br. 21. As AT&T has shown, *supra*, § I.A., United's no-marriage rule had the same relationship to its seniority system that AT&T's pre-PDA leave policies had to the NCS system, and both seniority systems are facially neutral in the same ways.

and that this discrimination reduced the amount of later [pension benefits]." *Ledbetter*, 127 S.Ct. at 2174. Since *Evans*, this Court has recognized in an unbroken string of cases—including *Bazemore*—that such an allegation does not establish a current violation of Title VII.

D. Section 706(e)(2) Is Irrelevant.

Respondents' extensive reliance on § 706(e)(2) is misplaced. Under that provision, a facially neutral seniority system adopted for an intentionally discriminatory purpose can be challenged, *inter alia*, when an employee is injured by application of that system. See 42 U.S.C. § 2000e-5(e)(2). Respondents concede, however, that they are not making such a claim, but instead rest their case entirely on the assertion that the NCS system is facially discriminatory. Br. 18 n.5, 29. Section 706(e)(2) also provides that a facially discriminatory seniority system be challenged when it is applied, but the NCS system was and is facially neutral. *Supra*, § IA.-C.

II. AT&T'S SERVICE CREDIT DENIALS WERE ACTIONABLE EMPLOYMENT PRACTICES.

Respondents also try to escape the dispositive import of *Evans* and its progeny by arguing that AT&T's pre-PDA service credit denials could not have been challenged when made. They cannot dispute that seniority or service credit is a term, condition, or privilege of employment, and that denials of service credit are therefore employment practices within the meaning of the statute, Ptr. Br. 38-40. Instead, respondents erroneously claim their service credit denials had only an "abstract and conjectural" potential to affect their employment rights, and thus were not immediately actionable. Br. 31, 34. In fact, denial of seniority results in actionable "concrete

harm." See *Lorance* v. *AT&T Techs.*, 490 U.S. 900, 907-08 (1989).

A key factor in AT&T's pre-PDA benefit formula was an employee's term of employment, measured in years, months and days. Accordingly, as the parties' stipulation confirms, AT&T's denial of "the relatively small amounts of time at issue here," Resp. Br. 34, predictably resulted in lower pension benefits for respondents. See JA 42, 44, 47 (had each respondent received the denied service credit, her benefits would have been "correspondingly greater.").

In all events, an alleged unlawful denial of service credit is a completed employment practice subject to challenge. Seniority is a contract right generally linked to significant and substantial employment consequences. The deprivation of a contract right of this nature is therefore an "alleged unlawful employment practice" that starts the statute of limitation running on any Title VII claim. 42 U.S.C. § 2000e-5(e)(1). See U.S. Br. 23.

This Court's cases confirm this commonsense conclusion. In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), a discriminatory denial of tenure commenced the running of the limitations period. The subsequent discharge was simply a consequence of the earlier, allegedly discriminatory tenure denial. See *id.* at 257-58 (the "emphasis is not upon the effects of earlier employment decisions").

Respondents seek to distinguish *Ricks* by noting that the professor's job loss was the delayed, but "'*inevitable*'" "consequence of the denial of tenure.'" Br. 34 n.12 (quoting *Ricks*, 449 U.S. at 257-58). But *Lorance* rejected the same "inevitability" argument. Although the benefits of seniority, "like those of an

insurance policy payable upon the occurrence of a non-inevitable event," may be "speculative,"

> it makes no more sense to say that no "concrete harm" occurs when an employer provides a patently less desirable seniority guarantee than what the law requires than it does to say that no concrete harm occurs when an insurance company delivers an accident insurance policy with a face value of $10,000 when what has been paid for is a face value of $25,000. It is true that the injury to the employee becomes substantially *more* concrete when the less desirable seniority system causes his demotion, just as the injury to the policyholder becomes substantially more concrete when the accident occurs and the payment is $15,000 less than it should be. But that is irrelevant to whether there was *any* concrete injury at the outset. What the dissent means by "concrete harm" is what *Ricks* referred to as the point at which the injury become "most painful"—and that case rejected it as the point of reference for liability.

490 U.S. at 907 n.3 (citation omitted).

The courts of appeals have read *Ricks* and *Evans* to establish that a denial of seniority is an actionable employment practice. In *Alleyne* v. *American Airlines*, ___ F.3d ___, 2008 WL 4899450 (2d Cir. Nov. 17, 2008), the Second Circuit recently held that an employment discrimination claim arose for statute-of-limitations purposes when the employee learned of his allegedly discriminatory loss of seniority, *not* on the subsequent date of the termination of his employment. Similarly, Judge Posner explained in *Kennedy* v. *Chemical Waste Management*, 79 F.3d 49, 50 (7th Cir. 1996), that a deprivation of seniority "is an injury that sets the statute of limitations running,

even though the injury is contingent rather than actual unless and until job protection is needed" (citation omitted). See also *Huels* v. *Exxon Coal USA*, 121 F.3d 1047, 1051 (7th Cir. 1997) (claim accrued when plaintiff received allegedly discriminatory seniority ranking, even though it "was not a 'certain prelude' to being laid off"); *Cox* v. *City of Memphis*, 230 F.3d 199, 205 (6th Cir. 2000) (allegedly discriminatory seniority ranking is actionable notwithstanding the "possibility that one will be hired or promoted despite" that discrimination).[7]

Thus, it is irrelevant whether respondents were actually denied job bids, shift preferences or other seniority-related benefits. Br. 25.

> Many valuable job benefits are contingent. No one would doubt that taking away an employee's health insurance because of his race was a violation of Title VII of which the employee could

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[7] Service credit denials are thus not like poor performance evaluations. Resp. Br. 31-32. As the cases in text recognize, denial of seniority is much more significant because it either has certain consequences (*e.g.*, a corresponding loss of some amount of pension benefit here) or will have such consequences if certain not-improbable contingencies occur (*e.g.*, layoffs, promotions, or shift changes). Respondents' cases recognize that context is critical to determining whether a particular act is an employment practice. *See Oest* v. *Illinois Dep't of Corr.*, 240 F.3d 605, 611 (7th Cir. 2001). In addition, these cases involved poor performance evaluations that could not have any effect on terms or conditions of employment, *see Taylor* v. *Small*, 350 F.3d 1286, 1292-93 (D.C. Cir. 2003), or plaintiffs who had "not pointed to any immediate consequence[s] of the reprimands, such as ineligibility for job benefits like promotion, transfer to a favorable location, or an advantageous increase in responsibilities." *Oest*, 240 F.3d at 613. The clear implication is that a performance evaluation that could affect such opportunities would be actionable.

> complain the moment it was taken away, even though until he got sick and needed health insurance he would not have suffered a "real" injury.

Kennedy, 79 F.3d at 50. The "'proper focus [for calculating the limitations period] is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Ricks*, 449 U.S. at 258. Here, the alleged discriminatory act was AT&T's pre-PDA disparate treatment of pregnancy leave.

Finally, respondents claim that *individual denials* of service credit are *not* employment practices and that all the cases AT&T cites involve "change[s in] the terms of a *seniority system*." Br. 32-33 (emphasis added). But, the courts of appeals decisions just discussed hold that individual denials of seniority are actionable employment practices. And § 706(e)(2) casts no doubt on the validity of these holdings. Section 706(e)(2) relaxed the requirement that employees challenge the *adoption of policies* that were facially neutral but discriminatory in intent, see *Lorance*, 490 U.S. at 908-09, but necessarily recognized that workers could challenge an alleged individualized denial of seniority. In fact, the various cases respondents and their *amici* cite to show that AT&T's pre-PDA policies were unlawful before the PDA was passed simply confirm the obvious point that respondents could have and therefore should have sued to challenge the service credit denials decades ago. See *In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845 (8th Cir. 1979); *Communications Workers of Am.* v. *AT&T Co.*, 513 F.2d 1024 (2d Cir. 1975); *deLaurier* v. *San Diego Unified Sch. Dist.*, 588 F.2d 674 (9th Cir. 1978) (mandatory maternity leave illegal).

In short, the limitations period began to run on respondents' claims decades ago, and their claims are therefore time-barred.

III. THE LOWER COURT GAVE THE PDA IMPROPER RETROACTIVE EFFECT.

In ruling that AT&T's post-enactment reliance on pre-PDA service credit denials violate Title VII, the Ninth Circuit necessarily gave the PDA improper retroactive effect. Respondents' efforts to show otherwise are baseless.

A. The Lower Court Gave The PDA Impermissible Retroactive Effect.

A law operates retroactively when it "'tak[es] away or impair[s] vested rights acquired under existing laws, or creat[es] a new obligation, impos[es] a new duty, or attach[es] a new disability, in respect to transactions or considerations already past.'" *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006).[8] Respondents contend that none of these concerns is implicated here because AT&T is being held liable only for pension calculations made "decades after the PDA took effect." Br. 37. But this attempt to focus on AT&T's post-enactment benefit calculations cannot obscure the retroactive effects of the decision below.

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[8] *Fernandez-Vargas* belies respondents' claim, Br. 37, that this Court dismissed the centrality of a "vested rights" analysis in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004). In fact, *Altmann* employed the same language as *Fernandez-Vargas*. *See* 541 U.S. at 693. The passage respondents quote, Br. 37, is from a footnote in a later part of the *Altmann* opinion that addresses "whether anything in the [*statute*] . . . suggests that we should not apply it to . . . . preenactment conduct." *See* 541 U.S. at 697 (emphasis added).

The relevant event, for retroactivity purposes, is AT&T's pre-PDA service denials. These denials are indisputably the basis for AT&T's liability in this case. But for those decisions, respondents have no case.

Respondents and the lower court attempt to shift the focus to AT&T's post-enactment "fail[ure]" to recalculate or "'undo'" respondents' adjusted NCS dates. Pet. App. 7a, 19a, 21a; Br. 39. But, absent retroactive application of the PDA, AT&T had no duty to change those dates. Because respondents failed to challenge their adjusted NCS dates within 300 days of learning of them, AT&T was "*entitled* to treat [those] past act[s] as lawful." *Evans*, 431 U.S. at 558 (emphasis added). Each unchallenged adjustment was "the legal equivalent of a discriminatory act which occurred before the statute was passed," and thus had "*no present legal consequences*." *Id.* (emphasis added). AT&T's supposed failure to "undo" *lawful* NCS dates, therefore, could only be unlawful if the PDA had retroactively changed the legal character of respondents' NCS dates.

And holding AT&T liable for this post-enactment "failure" would give the PDA retroactive effect. The lower court's interpretation of the PDA would "tak[e] away or impair[] vested rights [AT&T] acquired under existing laws," *Fernandez-Vargas*, 548 U.S. at 37—*i.e.*, AT&T's "*entitle[ment]* to treat" pre-PDA service credit calculations that were not timely challenged "as lawful." *Evans*, 431 U.S. at 558 (emphasis added).[9] Similarly, such an application of the PDA would "creat[e] a new obligation, impos[e] a

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[9] AT&T's settled expectations, therefore, derived not only from *Gilbert*, *cf.* Resp. Br. 43, but also from respondents' failure to challenge the service credit denials when they occurred.

new duty, or attach[] a new disability, in respect to transactions or considerations already past." *Fernandez-Vargas*, 548 U.S. at 37. As the lower court read it, the PDA would impose a new duty (*i.e.*, to award service credit) and attach a new disability (*i.e.*, liability for failure to award such additional service credit) to pre-PDA service credit decisions that have "no present legal consequences," *Evans*, 431 U.S. at 558.

These new disabilities and corresponding impairments of vested rights are completely different than the loss of a railroad's "right" to dam up flood waters, *Chicago & Alton R.R.* v. *Tranbarger*, 238 U.S. 67 (1915), an employer's "right" to continue to discriminate by race in compensation, *Bazemore*, 478 U.S. at 395-97, an alien's right "to continue illegal conduct indefinitely under the terms on which it began," *Fernandez-Vargas*, 548 U.S. at 47, or a school's "right" to admit students based on SAT scores, Resp. Br. 38. AT&T was not held liable simply for continuing conduct (denying full service credit for pregnancy leave) after Congress prohibited that conduct. Conversely, respondents' examples involve imposition of no new duties or disabilities with respect to *already completed* transactions. See, *e.g.*, *Bazemore*, 478 U.S. at 395 ("recovery may not be permitted for pre-1972 acts of discrimination").

Respondents attempt to elide these critical differences by describing AT&T's pre-PDA service credit awards as incomplete acts that merely "marked respondents for future discriminatory treatment" that the PDA could "frustrat[e]" without retroactive effect. Br. 38. But *Evans* forecloses this claim. Once respondents failed to challenge them, AT&T's pre-PDA service credit awards had no continuing legal consequences, and AT&T was

"*entitled*" to rely on them as lawful. 431 U.S. at 558 (emphasis added).

While it is ultimately irrelevant that AT&T could "'undo'" its pre-PDA decisions, Resp. Br. 39, under any "'commonsense, functional'" view, *Fernandez-Vargas*, 548 U.S. at 43, it is clear that, under respondents' reading of the PDA, AT&T cannot escape liability for actions it took prior to the PDA. The only way it could avoid liability would be to grant service credit to respondents and potentially thousands of putative class members, and increase their pension benefits—precisely the relief respondents seek. See Compl., Prayer for Relief ¶¶ 3-6 (seeking recalculation of NCS dates and of retirement benefits based on revised NCS dates). In every practical sense, therefore, AT&T is helpless, under respondents' reading of the PDA, to escape liability (or its functional equivalent) for acts that were (a) completed prior to the PDA and (b) that it was entitled to treat as lawful.

Nor is there any basis to respondents' disingenuous claim that retroactive application of the PDA will have a "predictably modest" impact on AT&T. Br. 43. They suggest that the class in this case is likely to be small, *id.* at 42 & n.17, but they have alleged that it "would be in excess of 15,000" women. Compl. ¶ 15. Because AT&T's occupational pension plan calculates pensions based on months of service, the amount at stake from a "few weeks or months" of service would be significant. Indeed, it is a matter of public record that a comparable suit was settled for nearly $50 million.[10] Imposition of liability based on decisions that AT&T was entitled to treat as lawful would

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[10] *See Verizon Bias Suit Deal Sets Record; Pregnancy Case Yields Payout Of $48.9 Million*, Wash. Post, June 6, 2006, at D1.

plainly upset AT&T's settled expectations, regardless of how many other companies face liability under respondents' reading of the law.[11]

B. The PDA Does Not Impose Liability For AT&T's Post-Enactment Benefit Awards.

Nothing in the PDA provides the necessary clear evidence that Congress intended such retroactivity. To the contrary, its language forecloses such a reading.[12]

The PDA's first sentence overturns *Gilbert* by providing that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The second clause "explains the application of the general principle [embodied in the first clause]," *Newport News*, 462 U.S. at 678 n.14, by providing that "women affected by pregnancy" must be treated for all employment purposes "as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

The language of the second clause refutes respondents' reading. It identifies women who are *both* "affected by pregnancy" *and* "similar in their ability or inability to work" as persons not so affected. This parallelism makes clear that the phrase

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[11] The *amicus* filings by the ERISA Industry Committee and Equal Employment Advisory Council belie respondents' further, equally unsupported, speculation that few companies would be affected by affirmance of the decision below.

[12] AT&T is not estopped from contesting respondents' interpretation of the PDA. Resp. Br. 48. AT&T argued that the PDA's "language clearly indicates that it applies only prospectively," and it attacked the lower court's contrary reading. Ptr. Br. 19-21 & n.6.

"affected by pregnancy" is temporally limited to the period of actual disability, when a comparison of a woman's ability or inability to work can be made.[13] By contrast, it is nonsensical to say that, at the time they *retired*, respondents were "affected by pregnancy" and treated differently than "other persons not so affected but similar in their ability or inability to work." Indeed, an ability or inability to work is irrelevant in the case of retirees. At a minimum, this is hardly the kind of "explicit language" necessary to show that Congress intended to render illegal any post-enactment effects that can be traced to pre-enactment pregnancy-based distinctions.

Moreover, as AT&T demonstrated, the PDA's delayed effective date for benefits programs plainly reveals Congress's intent to apply the PDA only *prospectively* to such programs. Ptr. Br. 19-20. Respondents claim that Congress thought Title VII already barred seniority denials for pregnancy leaves, and thus did not expect the delay to apply to seniority-based benefits. Br. 50. But, as AT&T has shown, that understanding was mistaken: Title VII did not bar such denials before the PDA, and even if such denials could have been challenged on disparate impact grounds, those actions became lawful under *Evans* if not timely challenged. See *supra*, § I.B.-C. Thus, Congress's alleged mistaken understanding confirms that it failed to give the PDA retroactive effect for seniority-based benefits programs (because

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[13] The statute's reference to "receipt of benefits" does not suggest otherwise: it requires that a woman affected by pregnancy receive, during her period of pregnancy-related disability, the same benefits (*e.g.*, disability pay) received by others "not so affected but similar in their ability or inability to work."

it viewed such a step as unnecessary) and instead prescribed prospective effect for *all* benefits programs.

IV. THE DECISION BELOW IS INCONSISTENT WITH § 703(h) OF TITLE VII.

Section 703(h) of Title VII confirms that AT&T cannot be held liable simply because the NCS system gives present effect to pre-PDA NCS date adjustments. Under this provision, it is not unlawful for a bona fide seniority system "to perpetuate the effects of pre-Act discrimination." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 352-53 (1977). Respondents contend that § 703(h) is inapplicable because the NCS system is not bona fide. Br. 51-52. But as AT&T has shown, *supra*, § I, the NCS system is facially neutral, and respondents disavow any claim, Br. 18 n.5, 29, that it had its "genesis in [gender] discrimination." *Teamsters*, 431 U.S. at 356.

The Ninth Circuit held that § 703(h) does not apply to pregnancy discrimination at all. Respondents only half-heartedly defend this reading, claiming § 703(h) is a dead letter only in pregnancy discrimination claims concerning fringe benefits. Both interpretations are wrong. Nothing in the language or history of the PDA supports the extraordinary and anomalous conclusion that Congress permitted bona fide seniority systems to perpetuate the effects of pre-Act discrimination against black and female workers generally, but not pre-Act discrimination on the basis of pregnancy.

The PDA provides that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . and *nothing in section 2000e-2(h) [§ 703(h)] of this title shall be*

interpreted to permit otherwise." 42 U.S.C. § 2000e(k) (emphasis added). As the en banc dissenters and the United States have explained, the underscored text refers only to the last sentence of § 703(h), the so-called Bennett Amendment, which this Court had construed to permit pregnancy discrimination. See *Gilbert*, 429 U.S. at 144-45; see also *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987) (noting that "the [PDA's] second clause was intended to overrule the holding in *Gilbert*"); Ptr. Br. 51-52.

The language of the PDA refutes the Ninth Circuit's far more expansive, and unsupportable, reading. By providing that "women affected by pregnancy . . . shall be treated *the same for all employment-related purposes* . . . as other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k) (emphasis added), the PDA merely places pregnancy on the same footing as other types of protected status. Treating "women affected by pregnancy" the *same* as all other workers means that a bona fide seniority system can perpetuate the effects of pre-Act discrimination against pregnant women just as it can perpetuate the effects of pre-Act discrimination against blacks and non-pregnant women. The PDA's clear mandate of equal treatment is not a mandate for superior protection for pregnant workers. And for this same reason, the PDA cannot be read to suspend § 703(h) only in "fringe benefit discrimination" cases like this one. Resp. Br. 52 n.22. The PDA mandates equal treatment of "women affected by pregnancy" for "*all* employment-related purposes, *including* receipt of benefits under fringe benefit programs." 42 U.S.C. § 2000e(k) (emphases added).

Furthermore, the PDA's legislative history clearly refutes respondents' reading.[14] Indeed, respondents concede that this history confirms that the PDA's proviso "reflects . . . Congress['s] . . . concern[ ] that courts not read the language in Section 703(h), arising from the Bennett Amendment, as an excuse for allowing pregnancy discrimination." Br. 53; see also Ptr. Br. 52-53. Yet they assert that Congress "plainly responded" to this limited concern regarding the Bennett Amendment and the Equal Pay Act by rendering "the entirety of Section 703(h)—not simply its last sentence—inapplicable." Br. 53. This non-sequitur only underscores the error in respondents' position.

Because § 703(h) is fully applicable to this case, it provides an independent mandate for reversal of the decision below.

V. NO DEFERENCE IS OWED TO THE VIEWS OF THE EEOC.

Finally, no deference is owed to the views of the EEOC. The agency's views have not been consistent. Its interpretation gives the PDA improper retroactive

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[14] Respondents dismiss the legislative history because the text of the statute is clear. But, as AT&T has just shown, the PDA's plain language undermines any broad suspension of § 703(h), and respondents themselves posit a "textual conflict" between § 703(h) and the PDA. Br. 52. Respondents' interpretive canon provides no basis for ignoring legislative history, *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S.Ct. 2007, 2019 (2008) (this Court "ha[s] never held that [an interpretive canon] displaces the other traditional tools of statutory construction," including legislative history), and that canon has no force where, as here, the proposed interpretation would impliedly repeal an earlier enactment. *See Morton* v. *Mancari*, 417 U.S. 535, 549 (1974) (noting "'cardinal rule'" that "'repeals by implication are not favored'").

effect. And that interpretation simply reflects the agency's preference for the Ninth Circuit's decision in *Pallas*, which deemed *Bazemore* controlling, rather than the Seventh Circuit's decision in *Ameritech Benefit Plan Committee* v. *Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), which deemed *Evans* the controlling authority, *id.* at 822-23.

Contrary to respondents' claim, the EEOC's views are not "long-held and consistent." Br. 54. Prior to the PDA, the agency stated that denials of seniority to women on pregnancy leave violated Title VII. See *id.* (quoting regulations). Its Compliance Manual now states the opposite. It provides a hypothetical comparable to the facts of this case and states that "the denial of service credit to women on maternity leave was *not unlawful* when [the charging party] took her leave in [1975]." *EEOC Compliance Manual*, ch. 3, Employee Benefits, Title VII/EPA Issues, III.B. (Oct. 3, 2000) (emphasis added).

Respondents try to brush this aside as a "passing" "assum[ption]." Br. 56 n.24. But the statement is unqualified, and the EEOC repeated it in its brief below. See JA 146. Indeed, citing *Evans*, it described pre-PDA service credit denials as "equivalent to a similar decision made after the PDA was in effect but which was not timely challenged." *Id.* at 137 n.1. This is a clear recognition that such pre-PDA acts were legal.

Thus, in stating that the PDA is violated by post-enactment reliance on a lawful pre-PDA service credit denial, the EEOC construes the PDA as applying retroactively. No deference is owed to such an interpretation. As AT&T has shown, there is no affirmative evidence that Congress intended the PDA to apply retroactively, and the Compliance Manual does not purport to identify any. Nor does it even

mention § 703(h), much less explain how its finding of a post-enactment PDA violation based on a lawful pre-PDA denial of service credit can be reconciled with § 703(h), which provides that it is not unlawful for a bona fide seniority system "to perpetuate the effects of pre-Act discrimination." *Teamsters*, 431 U.S. at 352-53.

In fact, the *only* support the EEOC identifies are the decisions in *Pallas* and two district court cases. *EEOC Compliance Manual*, ch. 3, Employee Benefits, Title VII/EPA Issues, III.B. n.96. That same footnote, see *id.*, notes the Seventh Circuit's contrary decision in *Ameritech*. Obviously, no deference is owed to an agency judgment that simply rests on lower court decisions, particularly where those decisions conflict, and this Court has granted *certiorari* to resolve that very conflict. See *Ledbetter*, 127 S.Ct. at 2177 n.11.

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment below should be reversed.

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SUPPLEMENTAL BRIEF

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AT&T CORPORATION,
Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

The Solicitor General does not dispute that the petition for certiorari raises the same question upon which this Court has twice denied certiorari, most recently in *Ameritech Benefit Plan Comm. v. Commc'n Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), despite the acquiescence of the respondent in that case. *See* BIO 5. The few developments the Solicitor General identifies since then provide no reason for a different result here.

I. The Government Fails to Show That the Petition Raises a Question Worthy of Interlocutory Review.

In acquiescing to certiorari in *Ameritech*, the respondent predicated that absent intervention by this Court, there would be pervasive litigation over the application of the Pregnancy Discrimination Act (PDA) to pension plans in a range of industries, leading to widespread conflict in the courts. *See* Brief for Respondents, No. 00-864, at 10-14. As the Solicitor General's brief illustrates, the past seven years have not borne out that prediction.

A. The Petition Presents No Question of Recurring Importance.

No one disputes that the question presented has no prospective importance; it is clear that an employer may not discriminate in calculating the pensions of women who took maternity leave after 1979. Moreover, there are many reasons, aside from the legal compulsion of the PDA, why a company

might forgo discrimination against women who took pregnancy leave *before* that date. Companies might, for example, believe that equal treatment is required by other state or federal laws,[1] or have agreed to equal treatment as part of a collective bargaining agreement, or they may simply believe that avoiding such discrimination is the right thing to do. The critical question, then, is how many employers actually follow petitioner's policy of discrimination and how many employees are potentially affected.

On this important question, the Solicitor General offers no guidance. The best the Government can say is that "the number of employees or employers affected by the decision in this case is unclear." Br. 19. At the same time, the Solicitor General candidly acknowledges that the question presented "presumably will have diminishing prospective application, given that the class of employees affected by pre-PDA pregnancy policies necessarily will dwindle over time." *Id.*

The Solicitor General nonetheless argues that the fact that three courts of appeals have addressed the question is reason enough to warrant certiorari. *Id.* But two of those courts had issued their conflicting

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[1] *See, e.g., Pallas v. Pacific Bell*, 940 F.2d 1324, 1327 (9th Cir. 1991) (finding that discrimination violated California law and the Employee Retirement Income Security Act); *Harriss v. Pan Am. World Airways*, 649 F.2d 670, 678-79 (9th Cir. 1980) (holding that similar discrimination in seniority system violated Title VII even prior to the effective date of the PDA) (citing *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977)).

decisions when this Court denied certiorari in *Ameritech*. And in acquiescing to certiorari in that case, the employer advised the Court of then-pending litigation in the Sixth Circuit on the same issue. *See* Ameritech Br. 8. Moreover, all three decisions arose from the telecommunications industry and none indicates that the challenged practice is common elsewhere.

The Solicitor General's inability to identify other employers or industries that discriminate against women who took pregnancy leave before 1979 is telling. As the Government acknowledges, Br. 9 n.1, the EEOC has long taken the position that such discrimination is unlawful. Moreover, the EEOC has responsibility for enforcing the PDA through litigation and evaluates tens of thousands of administrative charges of discrimination every year. *See* 42 U.S.C. § 2000e-5. Presumably, if the EEOC were aware of any evidence that the practice challenged in this case occurred on a regular basis, the Solicitor General would have so advised this Court.

B. The Solicitor General Principally Relies on the Same Division of Authority That Existed When This Court Denied Certiorari in *Ameritech*.

The Solicitor General's assertion that the legal conflict among the circuits warrants review is no more convincing now than when this Court rejected substantially the same argument in *Ameritech*.

The only relevant subsequent development is the Sixth Circuit's decision in *Leffman v. Sprint Corp.*,

481 F.3d 428 (6th Cir. 2007). But that decision added little to the debate; for the most part it simply followed the Seventh Circuit's holding in *Ameritech* without acknowledging, much less refuting, the Ninth Circuit's conflicting opinion in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991). *See Leffman*, 481 F.3d at 431-33; *see also Ameritech*, 220 F.3d at 821-23 (likewise failing to acknowledge *Pallas*). Nor did either the Sixth or Seventh Circuit consider deference owed to the EEOC's construction of the statute. Accordingly, the circuit conflict remains shallow and largely ill-considered.

With time, that might change. The Ninth Circuit's detailed and considered opinion in this case may prompt the Sixth and Seventh Circuits to reconsider their positions or, at the very least, to join issue with the contrary view of their sister circuit should the issue arise again.

C. The Solicitor General Has Not Made the Case for an Exception to the Court's General Rule Against Interlocutory Review.

The Government's brief highlights the need for further percolation in other respects as well.

1. The Solicitor General suggests that the EEOC may have changed its view of the statute, stating that although the "EEOC, both in its compliance manual and its amicus brief submitted to the Ninth Circuit panel in this case, has taken the position that an employer's failure to grant credit for pre-PDA pregnancy leave in the circumstances presented here violates Title VII," the Commission nonetheless "has

not made a recommendation to the Solicitor General on what position the United States should take in this case in this Court." Br. 9 n.1.

While the precise degree of deference owed to the EEOC's view is a matter of dispute, it is common ground that the Commission's position is relevant and entitled to respect. *See, e.g.*, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-57 (1991); *id.* at 259-60 (Scalia, J., concurring in part and concurring in the judgment). For that reason, this Court and the courts of appeals are entitled to a candid statement of the EEOC's interpretation of this statute before undertaking to authoritatively construe it. Denying certiorari at this interlocutory stage would permit the Commission an opportunity to clarify its position, either in this case on remand, in another case,[2] or through amendments to its Compliance Manual.

2. While the Solicitor General insists that interlocutory review is appropriate because further proceedings will not "refine the questions presented," Br. 20, remand proceedings may well shed light on whether those questions are worthy of this Court's attention in the first place. In reviewing respondents' motion for class certification, and in

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[2] Petitioners understand that the EEOC has a pending suit raising the same issues in *EEOC v. Lucent Technologies, Inc.*, No. 05-269 (N.D. Cal.), which is stayed pending the Court's resolution of this petition. Were the Court to deny certiorari here, the Commission presumably will clarify its position in that case, which therefore may present a better vehicle for resolving the question presented, if necessary.

calculating damages, the district court will determine how many employees are affected by AT&T's practices and the financial consequences of that discrimination. Given that AT&T now owns most of the telecommunication companies whose policies have previously given rise to litigation, and given that no one has identified any widespread practice beyond the telecommunications industry, that information is of vital importance to the exercise of this Court's discretionary jurisdiction.

3. Applying the Court's traditional presumption against interlocutory review also would avoid the possibility that the statutory basis for the decision could be altered in the midst of this Court's deliberations. *Contra* SG Br. 20-21.[3] While the mere prospect of legislative action would not be grounds for denying certiorari on an otherwise certworthy question, it is a reason to decline petitioner's request for an exception to the Court's general rule against interlocutory review.

4. This Court also would do well to wait until all the courts in the circuit split have had an opportunity to review their precedent in light of *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), which the Ninth Circuit rightly found to be relevant authority on the question presented. *See* Pet. App.

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[3] If the Ledbetter Fair Pay Act were to pass early in the next Congress, and the next President were to sign it, the new legislation could become effective after briefing and argument are completed in this case, but before the Court issues its decision.

10a-11a; BIO 7-8. As discussed below, the Solicitor General is wrong in thinking that *Ledbetter* adds nothing of relevance.

II. The Solicitor General Has Misconstrued the Statute.

Refusing to present and defend the EEOC's interpretation of the PDA, the Solicitor General eseentially reiterates petitioner's objections to the court of appeals' decision in this case. Respondents have already addressed those objections in their brief in opposition. *See* BIO 6-15. We emphasize a few points below.

A. Petitioner's Facially Discriminatory Seniority System Is Subject to Challenge at Any Time.

The Solicitor General recognizes that in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), this Court held that "a facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time" because "a facially discriminatory system (*e.g.*, one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied." *Id.* at 912 & n.5. Prior to the decision in *Lorance*, this Court had applied the same principle in *Bazemore v. Friday*, 478 U.S. 385 (1986), to find that post-Title VII implementation of a facially discriminatory pay structure constituted a present unlawful employment practice even though adopted prior to the effective date of the Act. *See Ledbetter*, 127 S. Ct. at 2173.

And after *Lorance*, Congress passed the Civil Rights Act of 1991, adding Section 706(e)(2) to Title VII to codify and expanded the rule as applied to intentionally discriminatory seniority systems. *See* 42 U.S.C. § 2000e-5(e)(2).

1. The Solicitor General nonetheless asserts the rule of *Lorance* and Section 706(e)(2) does not apply because AT&T's seniority system is "logically indistinguishable from the one in *Evans*, which this Court concluded was neutral." Br. 13. That is incorrect. In *United Air Lines v. Evans*, 431 U.S. 553 (1977), the seniority system itself was neutral in all respects – it awarded job benefits based on seniority and its seniority accrual rules were entirely nondiscriminatory. *Id.* at 558. The plaintiff in *Evans* simply complained about discrimination entirely outside the seniority system – her prior termination – which had an *incidental* effect on her seniority. By contrast, in this case the rules of the seniority system *itself* are facially discriminatory, *see Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 607 (1980) (seniority accrual rules are part of seniority system), thus invoking the rule of *Lorance* and Section 706(e)(2).

2. The Solicitor General objects that AT&T's seniority system itself is not facially discriminatory because it calculates benefits based on accrued seniority (a neutral rule) and because the *current* seniority accrual rule is nondiscriminatory. Br. 14-15. But that is not the seniority system that was applied to respondents and it is not the one they challenge today. The relevant "seniority system" is the body of rules governing the plaintiffs' challenged

treatment, not the body of rules that will, in the future, govern the treatment of some *other* employee.

Adopting the Solicitor General's view would lead to absurd results and easy evasion of *Lorance* and Section 706(e)(2). Suppose, for example, an employer established a pension system in 1990 under which benefits depend on seniority and women are given half the seniority credit given to men for each day of service. Or suppose a *Bazemore*-like system in which black employees were given no seniority credit at all before the effective date of Title VII. Under the Solicitor General's interpretation, the employer could apply this system for years, then change its accrual rule before pensions became due and insist that neither *Lorance* nor Section 706(e)(2) applied because its system was no longer facially discriminatory. As a result, the female employees would be precluded from challenging the seniority system after its amendment and the black workers would simply have no right to equal pension treatment at all.

But that is plainly not the result intended by this Court's decisions or Section 706(e)(2). In *Bazemore* itself, this Court found liability despite the district court's finding that "Extension Service had conducted itself in a nondiscriminatory manner since it became subject to Title VII." 478 U.S. at 393. Moreover, the entire point of the 1991 amendment was to ensure that a seniority system infected with intentional discrimination would be subject to challenge not only when adopted, but also when implemented, often many years later. *See* H.R. Rep. No. 102-40, pt. II, at 23 (noting amendment was intended to forestall possibility that *Lorance* would be read to grandfather

in discriminatory seniority systems adopted prior to Title VII). Although Congress intended to provide special protection for the continuing consequences of pre-Act discrimination through a bona fide seniority system, it expressly declined to extend that protection when the seniority system itself was intentionally discriminatory. *See* 42 U.S.C. § 2000e-2(h).

3. The Solicitor General's further assertion (Br. 17) that Section 706(e)(2) is inapplicable by its plain terms is wrong as well.

The Government points out that Section 706(e)(2) applies to seniority systems "adopted for an intentionally discriminatory purpose *in violation of this subchapter*." 42 U.S.C. § 2000e-5(e)(2) (emphasis added). It urges this Court to construe this language to exclude cases in which a facially discriminatory seniority system – such as the *Bazemore*-based hypothetical above – is adopted prior to the effective date of Title VII, reasoning that at the time of adoption, the discriminatory purpose was not "in violation of this subchapter." *See* Br. 17.

The Government's construction is neither compelled by the text nor consistent with Congress's obvious purposes. The phrase "in violation of this subchapter" is best read to modify "intentionally discriminatory purpose" not the earlier word "adopted." *See* 42 U.S.C. § 2000e-5(e)(2). That is, the provision allows plaintiffs to challenge at any time a seniority system adopted for a purpose proscribed by Title VII at the time of the challenge. This reading is consistent with the provision's purposes – to ensure that intentionally

discriminatory seniority systems do not persist in perpetuity simply because they were not challenged when adopted – and with the sharp distinction the statute elsewhere draws between seniority systems that simply perpetuate pre-Act discrimination and seniority systems that are themselves intentionally discriminatory. *See* 42 U.S.C. § 2000e-2(h).

B. Respondents Challenge a Present Unlawful Employment Practice.

Even setting aside the special rules for facially discriminatory policies and intentionally discriminatory seniority systems, respondents' claims challenge a present-day unlawful employment practice and not, as the Solicitor General contends, the present effects of a past violation of Title VII.

The Solicitor General spends much of his brief belaboring the uncontested point that the current consequences of a prior violation do not constitute a present unlawful employment practice under Title VII. He then simply assumes the central contested point – that a discriminatory notation in a worker's employment file (here, a change in the worker's NCS date) without more, constitutes an unlawful employment practice that is actionable only when it occurs. This assumption is as wrong as it is undefended.

Many unlawful employment actions are preceded by precursor decisions that are not in themselves completed violations of Title VII subject to immediate challenge. As described in *Ledbetter*, employee pay decisions are often preceded by performance evaluations. *See* 127 S. Ct. at 2171. Likewise,

termination may follow from disciplinary warnings; productivity data are sometimes used in making promotion decisions; and records of unexcused absences may be used to deny a bonus. But that does not mean that discrimination with respect to these precursors is itself an unlawful employment action under Title VII. *See, e.g.*, *Oest v. Illinois Dep't of Corr.*, 240 F.3d 605, 612-13 (7th Cir. 2001) (negative performance evaluations and oral or written reprimands not actionable until resulting in "tangible job consequences"); *Taylor v. Small*, 350 F.3d 1286, 1292-93 (D.C. Cir. 2003) (to same effect). To construe each step toward an adverse employment action as a separate, actionable unlawful employment practice would inundate the EEOC and the courts with minor disputes that may, or may not, someday materially affect the employee. Congress wisely provided that a Title VII cause of action is not complete until the employer's discriminatory intent is joined with a concrete adverse employment action that actually alters an employee's "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see Ledbetter*, 127 S. Ct. at 2171 n.3.

Whether discriminatory recording of seniority credits arises to the level of an actionable adverse employment action is a critical question in this case because the rule of *Evans* applies only when the current adverse action is the result of a prior discriminatory act that was, itself, subject to challenge under Title VII. *See* 431 U.S. at 558. Yet, tellingly, neither the Government nor petitioner has cited a single case from this Court or any other entertaining a Title VII claim against an employer's

adjustment of seniority credits in the absence of any other adverse employment action.[4] And absent any demonstration that respondents were entitled to challenge discriminatory leave notations in their employment records before they were acted upon, the foundation of the Government's *Evans* argument collapses.

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[4] *Lorance* dealt with the modification of the rules of the seniority system itself, 490 U.S. at 903; the Court did not hold, and has never intimated, that an employee can bring a Title VII suit every time an employer adjusts the worker's seniority credits in a way that may, or may not, affect working conditions in the future.

CONCLUSION

For the foregoing reasons, and those stated in respondents' brief in opposition, the petition for a writ of certiorari should be denied.

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AMICUS CURIAE BRIEF

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No. 07-543

In the Supreme Court of the United States

AT&T CORPORATION, PETITIONER

v.

NOREEN HULTEEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether an employer violates Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA), when it determines eligibility for pensions and other benefits without granting service credit that female employees did not receive when they took pre-PDA pregnancy leave.

2. Whether finding such a violation would give impermissible retroactive effect to the PDA.

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INTEREST OF THE UNITED STATES

In 1978, Congress amended Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), to provide that Title VII prohibits discrimination based on pregnancy-based conditions. Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (42 U.S.C. 2000e(k)). This case concerns whether an employer violates Title VII when it determines eligibility for pensions and other benefits without granting service credit that female employees did not receive when they took pre-PDA pregnancy leave, and whether finding such a violation would give impermissible retroactive effect to the PDA. The United States, as both the principal enforcer of the civil rights laws and the nation's largest employer

subject to Title VII (see 42 U.S.C. 2000e-16 (2000 & Supp. V 2005)), has a strong interest in the proper interpretation of Title VII. At the Court's invitation, the United States filed a brief at the petition for a writ of certiorari stage of this case.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). The statute also provides, in relevant part, that "[n]otwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of * * * sex." 42 U.S.C. 2000e-2(h).

In general, a Title VII plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). In States that have an administrative agency with authority to remedy practices prohibited by Title VII, a plaintiff who initially proceeds before that agency must file a charge with the EEOC within 300 days "after the alleged unlawful employment practice occurred" or within 30 days of when the plaintiff receives notification that agency proceedings have been terminated, whichever is earlier. *Ibid.* California, where this action arose, has such an agency, 29 C.F.R.

1601.74, and the charges filed in this case are subject to a 300-day limitations period.

Title VII, as amended, also provides that

> an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of [Title VII] * * *, when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. 2000e-5(e)(2).

In *General Electric Co.* v. *Gilbert*, *supra*, this Court held that an employer's disability plan did not violate Title VII's prohibition against sex discrimination because it denied benefits for disabilities arising from pregnancy. The Court held "that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136; see *id.* at 138 (the insurance package "covers exactly the same categories of risk, and is facially nondiscriminatory").

In response to *Gilbert*, Congress enacted the PDA, which amended Title VII to provide that discrimination "because of sex" or "on the basis of sex" includes pregnancy-based conditions:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to

> work, and nothing in [42 U.S.C.] 2000e-2(h) * * * shall be interpreted to permit otherwise.

42 U.S.C. 2000e(k). The PDA became effective on October 31, 1978—the date of its enactment—except that its provisions explicitly did "not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act." § 2(b), 92 Stat. 2076.

2. As early as 1914, petitioner and its corporate predecessors used a service crediting system that, for purposes of pension and other benefits, relied on an employee's continuous employment in company service. J.A. 38-39 (¶ 17). To calculate continuous employment, petitioner and its predecessors used a "Net Credited Service" (NCS) date that is an employee's initial date of hire adjusted forward in time to exclude periods for which no service credit accrued. J.A. 39 (¶ 18). An earlier NCS date puts an employee in a superior position for service-related determinations such as job bidding, vacation time, and retirement benefits. Pet. App. 4a.

Before August 7, 1977, petitioner and its relevant predecessor company, Pacific Telephone & Telegraph (PT&T), classified pregnancy as personal leave. An employee on personal leave received a maximum of 30 days' NCS credit, while there was no limit on the amount of NCS credit for employees on temporary disability leave. J.A. 47-48 (¶¶ 66-68). On August 7, 1977, PT&T extended the maximum NCS credit for pregnancy to 30 days before delivery and up to six weeks after delivery. J.A. 48-49 (¶¶ 70-71). On April 29, 1979, the date the PDA became effective for fringe benefits and insurance programs, PT&T began to provide service credit for pregnancy leave on the same terms as for other temporary disability leave. PT&T made no adjustments, however, to the existing NCS dates of female em-

ployees who had taken pregnancy leave before April 29, 1979. J.A. 50 (¶ 79).

3. Respondents are past or present employees of petitioner who took pregnancy leaves before April 29, 1979, while employed by PT&T. J.A. 36, 40, 42, 44, 45 (¶¶ 1, 2, 25, 35-38, 48, 57). When respondents returned from pregnancy leaves, PT&T adjusted their NCS date forward to reflect that a portion of their leave was not entitled to service credit. Those adjustments were made before the PDA became effective. J.A. 41-45 (¶¶ 28, 37, 39, 50, 59). From 1994 to 2000, three of the individual respondents were involuntarily terminated or retired pursuant to a voluntary incentive/termination offer. J.A. 41-43, 46 (¶¶ 33, 44, 45, 64). Their adjusted NCS dates were used to calculate pension and other benefits. J.A. 42, 43-44, 46 (¶¶ 34, 46, 64). The fourth individual respondent is a current employee. Pet. App. 5a.

None of the respondents filed a charge of discrimination with the EEOC within 300 days of their pregnancy leaves or of the effective date of the PDA. J.A. 55 (¶ 98). Instead, they filed charges with the EEOC between 1994 and 2002—more than 15 years after the PDA took effect—when they applied for pension benefits and their benefits were calculated using their NCS date. Pet. App. 6a; J.A. 54 & n.4 (¶ 93). Respondent Communications Workers of America, the collective bargaining representative for most of petitioner's non-management employees, also filed a charge during this period. Pet. App. 6a & n.2; J.A. 55 (¶ 95).

The EEOC found reasonable cause to believe that petitioner had discriminated against respondent Hulteen and a class of similarly situated female employees by refusing to give them full service credit for pre-PDA pregnancy-related leaves and issued a right to sue notice. Pet. App. 6a; J.A. 54-55 (¶¶ 94, 96). Respondents then filed suit in dis-

trict court, seeking relief on their own behalf and on behalf of other similarly situated employees. Pet. App. 100a; J.A. 55 (¶ 96). They alleged that the failure to credit them with time they were on disability leave due to pregnancy violated, *inter alia*, Title VII. Pet. App. 99a-100a.

4. The district court granted summary judgment in favor of respondents on the Title VII claim. Pet. App. 98a-128a. The court concluded (*id.* at 106a-123a) that the claim was controlled by *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), cert. denied, 502 U.S. 1050 (1992), which involved the same NCS system as implemented by one of petitioner's predecessor companies (Pacific Bell). *Pallas* held that Pacific Bell's failure to grant employees credit for pre-PDA pregnancy leaves when calculating retirement benefits after the PDA violated Title VII. *Id.* at 1326-1327.

The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b), and the Ninth Circuit granted petitioner permission to appeal. Pet. App. 69a.

5. A divided Ninth Circuit panel reversed. Pet. App. 64a-85a. The panel majority concluded that *Pallas* had been overcome by *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), which clarified that a statute has no retroactive application absent a clear expression of congressional intent. Pet. App. 71a, 83a. The panel majority further concluded that it would give an impermissible retroactive effect to the PDA to hold that petitioner violated Title VII for not granting full credit for pre-PDA pregnancy leaves. *Id.* at 75a-76a. The panel majority also held that respondents' claims were time-barred because they should have been brought when the initial accountings for pregnancy leaves were made before 1979 or at the latest when the PDA became effective in 1979. *Id.* at 81a-82a. Judge Rymer dissented; she agreed with the panel majority's analysis "on a

fresh slate," but concluded that *Pallas* remained binding circuit law and dictated the opposite result. *Id.* at 86a-97a.

6. A divided en banc Ninth Circuit affirmed the district court's decision. Pet. App. 1a-63a. The majority concluded that petitioner's seniority system was facially discriminatory, and therefore unlawful, "because it treat[s] similarly situated employees differently if the female employee took a pre-PDA pregnancy-related disability leave," *id.* at 18a n.7; accord *id.* at 23a, and that petitioner intentionally discriminated on the basis of pregnancy each time petitioner used that system to calculate benefits. *Id.* at 10a-11a. The majority also pointed to 42 U.S.C. 2000e-5(e)(2), which provides that an unlawful employment practice occurs, *inter alia*, when a person is injured by application of a seniority system adopted for an intentionally discriminatory purpose. Pet. App. 19a-20a.

The majority acknowledged that the Sixth and Seventh Circuits had reached a contrary conclusion in considering "nearly identical" Title VII challenges to similar NCS systems that, like the seniority system at issue in this case, "failed to credit time spent on pregnancy leave" before the PDA. Pet. App. 22a; see *id.* at 22a-27a & n.11 (discussing *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814 (7th Cir. 2000), cert. denied, 531 U.S. 1127 (2001), and *Leffman* v. *Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007)). But the majority disagreed with those decisions, reasoning that those courts incorrectly concluded that the NCS systems were not facially discriminatory and incorrectly relied on the exemption in 42 U.S.C. 2000e-2(h) for bona fide seniority systems. Pet. App. 23a-27a & n.11.

Four judges dissented. Pet. App. 29a-63a (O'Scannlain, J., dissenting). They concluded that the EEOC charges in this case were untimely under the line of cases beginning with *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

Pet. App. 37a-53a. In particular, the dissent concluded that petitioner's seniority system is facially neutral—and *non*-discriminatory—unless the PDA is impermissibly given retroactive effect. *Id.* at 44a-47a. The dissent also concluded that the seniority system fell within the exemption in 42 U.S.C. 2000e-2(h) for bona fide seniority systems, and that 42 U.S.C. 2000e-5(e)(2) did not apply in this case because petitioner did not adopt its seniority system for an intentionally discriminatory purpose in violation of Title VII. Pet. App. 53a-63a.

SUMMARY OF ARGUMENT

A. Title VII prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). In the PDA, Congress amended Title VII—in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976)—to provide that discrimination "because of sex" or "on the basis of sex" includes discrimination based on pregnancy-based conditions. 42 U.S.C. 2000e(k). Before the effective date of the PDA, however, it was not—according to this Court's decision in *Gilbert*—unlawful for employers to withhold service credit for pregnancy-related leave. By its terms, the PDA is not retroactive, and petitioner came into compliance with the PDA following its enactment.

Respondents' attempt to characterize petitioner's post-PDA benefit determinations as a *current* violation of Title VII fails under this Court's precedents, which preclude Title VII claims based on the lingering effects of past discrimination. In particular, respondent's position is foreclosed by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), which holds that Title VII is not violated every time an employment practice, including a seniority system, gives

present effect to past discrimination. Indeed, the unique feature of this case, compared with *Evans* and cases in the same line, is that the alleged past discrimination (*i.e.*, not granting full credit for pregnancy leaves before the PDA) was not proscribed by Title VII when it occurred. As in *Evans*, that past discrimination is "an unfortunate event in history," *id.* at 558, but it provides no basis for invalidating the seniority system at issue.

This Court's decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), does not compel a contrary result. *Bazemore* involved a discriminatory pay structure that continued after Title VII was passed into the pertinent limitations period. This case does not involve the "mere continuation" (*id.* at 397 n.6) of discriminatory practices after the PDA was passed. Here, by contrast, petitioner changed its policy and came into compliance with the PDA immediately upon its passage. *Bazemore* therefore has no application here. Instead, this case is controlled by *Evans*.

B. Section 706(e)(2), which addresses the timing of unlawful employment practices with respect to seniority systems, does not authorize respondents' suit either. Section 706(e)(2) was enacted to overrule the Court's decision in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and thus by its terms applies only to "a seniority system that has been adopted for an intentionally discriminatory purpose in violation of [Title VII]." 42 U.S.C. 2000e-5(e)(2). Unless the PDA is to be given retroactive effect (which Congress declined to direct), petitioner's failure to adjust service dates to credit pre-PDA pregnancy leaves retroactively could not intentionally violate Title VII—either on the effective date of the PDA or thereafter as petitioner calculated benefits based on NCS dates based in part on pre-PDA leaves. Because petitioner's seniority system has

at all times complied with the then-applicable provisions of Title VII, it does not fall within Section 706(e)(2).

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER VIOLATED TITLE VII

The divided en banc Ninth Circuit held that an employer violates Title VII if it does not grant employees service credit for pregnancy-related leave taken *before* the PDA was enacted in calculating pension benefits decades *after* the PDA was enacted. That decision gives an impermissible retroactive effect to the PDA by imposing liability on employers for refusing to credit leave taken before the PDA was enacted. Moreover, the decision cannot be reconciled with this Court's precedents—in particular, *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977)—holding that Title VII is not violated every time an employment practice, including a seniority system, gives present effect to past discrimination. This case follows a fortiori from cases like *Evans*, because (unlike *Evans*) the alleged past discrimination at issue—*i.e.*, not granting full credit for pregnancy leaves before the PDA was enacted—was not even proscribed by Title VII when it occurred. Accordingly, the court of appeals erred in holding that respondents have established a violation of Title VII.

A. The Ninth Circuit's Decision Gives The PDA An Impermissible Retroactive Effect And Directly Contravenes *Evans*

The court of appeals held that petitioner "violated Title VII by failing to credit pre-PDA pregnancy leave when it

calculated benefits owed [to respondents]." Pet. App. 7a. That holding is incorrect.[1]

1. The Ninth Circuit's decision is premised on the notion that, in calculating respondents' retirement benefits between 1994 and 2000, petitioner committed an unlawful employment practice under Title VII because the seniority system used to calculate those benefits does not treat pre-PDA pregnancy leave the same way as leave for temporary disabilities. Pet. App. 7a-28a. (As discussed above, petitioner treats post-PDA pregnancy leave the same as leave taken for temporary disabilities.) The court of appeals reasoned that petitioner's seniority system was facially "discriminatory," *id.* at 23a, 26a-27a, emphasizing that petitioner, in making such post-PDA benefit decisions, did not adjust respondents' service date by treating pre-PDA pregnancy leave the same as post-PDA pregnancy leave, *id.* at 19a, 20a-22a, 27a n.11. In a similar vein, respondents argue that calculating pension benefits in a manner that does not credit pre-PDA leave "perpetuates a facially discriminatory system which originated prior to the passage of the [PDA]." Compl. 16-17 (¶ 88(a)-(d)); see Br. in Opp. 8-13.

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[1] The EEOC, both in its compliance manual and its amicus brief submitted to the Ninth Circuit panel in this case, has taken the position that an employer's failure to grant credit for pre-PDA pregnancy leave in the circumstances presented here violates Title VII. 2 EEOC Compl. Man. (BNA) § 3(b) tit. VII at 627:0023 (Aug. 2001); EEOC Amicus C.A. Br. 6-26. For the reasons explained in this brief, that interpretation is based on a misreading of the relevant precedents of this Court, and therefore is not entitled to deference. *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2177 n.11 (2007) ("Agencies have no special claim to deference in their interpretation of our decisions."). As the government explained at the certiorari stage (Br. 9 n.1), the EEOC did not make a recommendation to the Solicitor General on what position the United States should take in this case in this Court.

That analysis does not withstand scrutiny under either the PDA or this Court's precedents. When petitioner adopted its pre-PDA leave policies and applied those policies to respondents' pregnancy leaves, the law did not dictate that pregnancy leave be treated the same as leave for other temporary disabilities. As discussed, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), explicitly held that an employer's disability plan did not violate Title VII's prohibition against sex discrimination because it denied benefits for disabilities arising from pregnancy. This Court concluded that the plan's exclusion of disabilities arising from pregnancy was "facially non-discriminatory," and the Court similarly stated that it was "impossible to find any gender-based discriminatory effect in [a] scheme simply because women disabled as a result of pregnancy do not receive benefits." *Id.* at 138; accord *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143-146 (1977) (upholding employer's policy of not awarding sick-leave pay to pregnant employees).[2]

The PDA superseded the result reached in *Gilbert*, but Congress declined to make that law retroactive to events or policies in place before its enactment. Indeed, the PDA not only did not apply retroactively, it did not even apply pro-

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[2] In respondents' brief in opposition (at 10 & n.3), they suggested in a footnote that petitioner's pre-PDA leave policies "arguably" constituted an unlawful employment practice under Title VII. Ultimately, to the extent the issue is even before this Court, any claim that petitioner's pre-PDA leave policy deprived them of pension benefits would be barred for the reasons that this Court gave in *Gilbert*. See 2 EEOC Compl. Man. (BNA) § 3(b) tit. VII at 627:0023 (Aug. 2001) ("Discrimination Based on Pregnancy, Childbirth, or Related Medical Conditions * * * Retirement Benefits") ("the denial of service credit to women on maternity leave was not unlawful" for employees who took leave before PDA's effective date); J.A. 146. And, in any event, any claim that the pre-PDA policy was unlawful accrued when respondents were denied credit before the PDA, and accordingly expired decades ago.

spectively to benefits programs "until 180 days after the enactment of th[e] Act." § 2(b), 92 Stat. 2076. Thus, when the PDA became effective for existing programs, it required employers—starting six months after its enactment—to treat pregnancy leaves on the same terms as other temporary disabilities only on a going forward basis.

In enacting the PDA, Congress did not obligate employers to grant employees credit for pre-PDA leave that Title VII did not (under *Gilbert*) require employers to grant before the passage of the PDA. That result would have required employers to adjust the service dates of female employees potentially reaching back decades. Such an affirmative undertaking is far different from the PDA's basic injunction to refrain from discrimination on the basis of pregnancy on a prospective basis. Congress did not specify that it was imposing such an affirmative obligation with respect to past events, and this Court's precedent forbids giving a statute such a retroactive effect without a clear textual directive to that effect. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994).

The presumption against retroactivity is "deeply rooted in our jurisprudence" and advances principles of fundamental fairness and settled expectations. *Landgraf*, 511 U.S. at 244; see *Republic of Austria* v. *Altmann*, 541 U.S. 677, 693 (2004); see also *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 723 (1978) ("Retroactive liability could be devastating for a pension fund."). The presumption is squarely implicated by this case because respondents in effect ask the Court to impose liability on petitioner for failing to grant credit for pregnancy leave taken before the PDA was enacted. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006) ("Statutes are disfavored as retroactive when their application 'would impair rights a party possessed when he acted, increase a party's liability for past

conduct, or impose new duties with respect to transactions already completed.' ") (quoting *Landgraf*, 511 U.S. at 280). Congress is of course free to override that presumption. But it plainly did not do so in the PDA.

2. a. The Ninth Circuit erred in believing that it was appropriate to give the PDA retroactive effect by simply holding that petitioner was required to credit pre-PDA pregnancy leaves whenever an employee benefit was calculated post-PDA on the basis of an NCS date predicated in part on pre-PDA leave policies. To be sure, the calculation of respondents' benefits had the effect of perpetuating petitioner's pre-PDA pregnancy-leave policies, and those policies were "discriminatory" insofar as they distinguished between leave taken for pregnancies and for other temporary disabilities—though before the PDA, that discrimination (while certainly objectionable) was not forbidden by Title VII. That kind of perpetuation-of-past discrimination claim (even for discrimination that was unlawful when it occurred), however, is directly foreclosed by this Court's precedents, especially *United Air Lines, Inc.* v. *Evans*, *supra*.

In *Evans*, a flight attendant was forced to resign her position based on an unlawful policy that prohibited female flight attendants from being married. 431 U.S. at 554-555. She was rehired by the same employer, but the employer used her rehiring date, rather than her original date of hire, to determine her seniority. *Id.* at 555. The employee brought suit alleging that the employer had violated Title VII "by refusing to credit her with seniority [based on her original date of hire]." *Id.* at 554. While acknowledging that the use of the employee's rehiring date to determine her seniority would perpetuate a past act of allegedly unlawful intentional discrimination, the Court rejected the employee's claim. *Id.* at 557-558. The Court explained that

the critical inquiry under Title VII is not whether there are continuing consequences of a past act, but whether "any present *violation* exists." *Id.* at 558. The Court concluded that "[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of *a discriminatory act which occurred before the statute was passed.* It * * * is merely an unfortunate event in history which has no present legal consequences." *Ibid.* (emphasis added).

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the college denied Ricks tenure and issued him a one-year contract after which his employment with the college would end. *Id.* at 252-253. Ricks failed to file a charge within 180 days of the denial of tenure, and instead filed a charge several months before his contract expired. *Id.* at 254-255. The Court rejected Ricks's claim that he could wait to challenge the tenure decision as intentionally discriminatory until after his employment contract expired, explaining that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Id.* at 258 (citation omitted). The Court also emphasized that, under *Evans*, "[t]he emphasis is not upon the effects of earlier employment decisions; rather, it is [upon] whether any present *violation* exists." *Ibid.* (citation and internal quotation marks omitted; second pair of brackets in original).

Likewise, in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), female employees challenged a change in the seniority system on the ground that the system was intentionally altered in order to protect incumbent males. The employees did not do so, however, until more than three years after the change was made. *Id.* at 905-906. The Court held that the employees could not resurrect their untimely challenge to an intentionally discriminatory change in a seniority system by claiming that an unlawful

employment practice occurred not only when the seniority system was changed, but also each time its concrete effects were felt. *Id.* at 906. Relying on *Evans* and *Ricks*, the Court explained that a Title VII plaintiff may not assert "a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations." *Id.* at 908.[3]

Most recently, in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), the Court—relying on its prior decisions—again rejected the "present effect" argument, explaining that "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Id.* at 2169. In so holding, the Court specifically reaffirmed its decision in *Evans* and stated that "[t]he fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation." *Id.* at 2174. Indeed, even the dissenters in *Ledbetter* did not question the rule against perpetuation-of-past-discrimination claims in the seniority-system context in which that claim arose in *Evans*. See *id.* at 2182-2183.[4]

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[3] In response to *Lorance*, Congress enacted 42 U.S.C. 2000e-5(e)(2), discussed pp. 23-27, *infra*. While *Lorance*'s specific holding on when the adoption of an intentionally discriminatory seniority system must be challenged has been superseded by statute, the decision's analysis of Title VII's timeliness requirement remains authoritative for other purposes. *Ledbetter*, 127 S. Ct. at 2169 n.2.

[4] The dissenters in *Ledbetter* distinguished the *Evans-Ricks-Lorance* line of cases based on the "significant differences" that they perceived "between pay disparities" (the alleged discrimination in *Ledbetter*) and the types of discrimination at issue in the *Evans-Ricks-Lorance* line of cases. 127 S. Ct. at 2182; see *id.* at 2181-2182 (arguing that the "realities of the workplace" call for a different approach in evaluating claims of discriminatory pay disparities). The discrimination at issue in this

b. Those decisions—and, in particular, *Evans*—dispose of respondents' Title VII claim. Petitioner's pre-PDA leave policy is "a discriminatory act which occurred before the statute was passed * * * which has no present legal consequences" because the discrimination was not unlawful at the time. *Evans*, 431 U.S. at 558. Indeed, as noted above, this case follows a fortiori from those decisions because the predicate act of discrimination here was not forbidden by Title VII (as interpreted by this Court) when it occurred. That discrimination is "an unfortunate event in history," *ibid.*, but it does not support the Title VII claim here. And even to the extent respondents believe (contrary to *Gilbert*) that petitioner violated Title VII when it denied full service credit for pre-PDA pregnancy leaves, that purported violation occurred when the credit was denied prior to the PDA (or, if the violation is the failure to adjust service dates in light of the PDA, then upon passage of the PDA).

Respondents could have, but did not, challenge the denial of such leave when it occurred—decades ago. Thus, under *Evans*, petitioner "was entitled to treat that past act as lawful after respondent[s] failed to file a charge of discrimination" within the 300-day charging period. *Evans*, 431 U.S. at 558. Thus, even assuming that petitioner violated Title VII by failing to give pre-PDA pregnancy leave

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case, however, is directly analogous to that alleged in *Evans*. In addition, the concerns raised by the dissenters in *Ledbetter* about the ability of employees to detect "[c]ompensation disparities * * * hidden from sight" (*id.* at 2181) have no bearing here, where all employees had notice of the terms of the seniority and leave policies at issue. See *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000) (plaintiffs "knew the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off" and "[n]o later than the time when [the company] amended its plan in response to the PDA, they knew that their NCS had not been amended"), cert. denied, 531 U.S. 1127 (2001).

the same treatment as leave taken for temporary disabilities, such a violation occurred, at the latest, on the effective date of the PDA, and respondents' claims are accordingly time-barred under *Evans*.

Respondents argue that *Evans* is distinguishable on the grounds that the seniority system in this case is "facially discriminatory," and therefore discriminates each time it is applied. See Br. in Opp. 8-13. But petitioner's seniority system is logically indistinguishable in operation from the one in *Evans*, which this Court concluded was neutral and nondiscriminatory because it did not "treat[] former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason." 431 U.S. at 558; *id.* at 557. This Court has repeatedly reaffirmed *Evans* and explained that the fact that past discrimination "adversely affects the calculation of a *neutral* factor (like seniority) that is used in determining [benefits]" does not render the benefits system discriminatory on its face, or mean that "each new [benefits decision] constitutes a new violation." *Ledbetter*, 127 S. Ct. at 2174 (emphasis added); see *id.* at 2182-2183 (Ginsburg, J., dissenting) (distinguishing *Evans* and claims alleging the discriminatory application of a seniority system from the pay disparity claim in *Ledbetter*).

Petitioner's seniority system is neutral and nondiscriminatory because the NCS date does not treat employees who used personal leave and were denied credit for a "discriminatory" reason any differently from employees who used personal leave and were denied credit for other reasons. Pet. App. 43a-45a (O'Scannlain, J., dissenting); *Leffman* v. *Sprint Corp.*, 481 F.3d 428, 433 (6th Cir. 2007) (finding *Evans* controlling because employer does not treat "employees who have taken non-credited maternity leave differ-

ently from employees who have taken other kinds of non-credited leave"); *Ameritech Benefit Plan Comm.* v. *Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000) (*Ameritech*) (finding *Evans* controlling because "simplistic as it may seem, [the] case involves computation of time in service—seniority by another name—followed by a neutral application of a benefit package to all employees with the same amount of time"), cert. denied, 531 U.S. 1127 (2001); cf. *Satty*, 434 U.S. at 140 (employer's "decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy").

To be sure, petitioner's seniority system "gives present effect to a past act of discrimination" (*Evans*, 431 U.S. at 558) insofar as it does not make an affirmative adjustment for pregnancy leaves taken before the PDA. But the same was true in *Evans*: the plaintiff there was forced to resign under the employer's discriminatory no-marriage policy and the employer's seniority system gave present effect to that discrimination by not "credit[ing] her with seniority for [her original hire period]." *Id.* at 554. And even respondents do not contest "that the current consequences of a prior violation do not constitute a present unlawful employment practice under Title VII." Supp. Br. 11.

The only relevant difference between this case and *Evans* is that, here, the past "discrimination" (*i.e.*, not allowing full credit for pregnancy leave before the PDA) was not unlawful when it occurred, whereas the past discrimination in *Evans* (*i.e.*, forcing female employees who married to resign) was unlawful when it occurred. See *Evans*, 431 U.S. at 554. A fortiori, petitioner's *lawful* pre-PDA discriminatory intent cannot be "shift[ed] * * * to a later act that was not performed with bias or discriminatory motive." *Ledbetter*, 127 S. Ct. at 2170. Indeed, the court of appeals'

reliance on petitioner's purported ability from 1994 to 2000 to give respondents credit for their pre-PDA time spent on pregnancy leave "to thus avoid violating the PDA" (Pet. App. 19a) is yet another way of impermissibly giving the PDA retroactive effect. Pet. App. 45a-47a (O'Scannlain, J., dissenting). And respondents make a similar mistake in pointing out that "[t]he relevant seniority system is the body of rules governing [respondents'] challenged treatment." Supp. Br. 8-9 (internal quotation marks and citation omitted). Those rules can only be deemed facially discriminatory if the PDA retroactively required petitioner to recalculate service dates of female employees reaching back decades before the passage of the PDA.[5]

This Court's decision in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), is not to the contrary. In that case, the Court held that the employer violated Title VII by continu-

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[5] The above analysis squares with the intent of Title VII. As this Court held in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 352-354 (1977), a seniority system does not lose its "bona fide" character under Section 703(h), 42 U.S.C. 2000e-2(h), because it perpetuates pre-Act discrimination. To the contrary, an "unmistakable purpose" of Congress in enacting Title VII was "to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII," even where the seniority system "perpetuate[d] the effects of pre-Act discrimination [between employees of different racial groups]." 431 U.S. at 352-353. The court of appeals dismissed (Pet. App. 23a-27a) the significance of Section 703(h) because a proviso in the PDA states that Section 703(h) cannot be interpreted to permit discrimination prohibited by the PDA. See 42 U.S.C. 2000e(k). But as discussed, petitioner has not violated the PDA (to the contrary, it changed its leave policies to comply with the PDA), and the proviso in any event was not intended to remove Title VII's protection for bona fide seniority systems in cases involving pregnancy, but rather to foreclose the possibility, raised in *Gilbert*, that the last sentence of Section 703(h) would permit wage discrimination on the basis of pregnancy. See Pet. App. 57a-59a (O'Scannlain, J., dissenting).

ing—after Title VII was enacted—to pay black employees less than white employees even though the pay disparities resulted from a pay structure that pre-dated Title VII. *Id.* at 395. The Court explained that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer *continued* to engage in that act or practice, it is liable under that statute." *Ibid.* (emphasis added). As the Court emphasized in *Ledbetter*, "the focus in *Bazemore* was on a current violation [*i.e.*, the continuation of a discriminatory pay structure], not the carrying forward of a past act of discrimination." 127 S. Ct. at 2173 n.5.

This case is the opposite of *Bazemore*. It does not involve the "mere continuation" (*Bazemore*, 478 U.S. at 397 n.6) of discriminatory practices after the PDA was enacted. To the contrary, as of the effective date of the PDA, petitioner changed its policy to *eliminate* its prior pregnancy leave policy and provide service credit for all prospective pregnancy leaves on the same basis as leave taken for other temporary disabilities. J.A. 50 (¶ 79). As explained by the en banc dissent: "*Bazemore* would only be analogous in this case if [petitioner] had continued to deny full NCS seniority credit to female employees who had taken pregnancy leave after the enactment of the PDA and attempted to defend that practice on the ground that it began before the enactment of that Act. But [petitioner] did no such thing." Pet. App. 51a-52a (footnote omitted). Rather, quite unlike the plaintiffs in *Bazemore* (see 478 U.S. at 396-397 n.6), respondents here are seeking to impose retroactive liability on the employer for its policies before they were made unlawful by the pertinent statute, and not for a present violation stemming from a *continuation* of such policies.

c. Respondents cannot escape the clear import of this Court's precedents simply by saying that they are challenging the denial of pension benefits as those benefits become due (because those benefits are calculated without granting credit for pre-PDA pregnancy leave), rather than the denial of pre-PDA leave. Br. in Opp. 11. This Court repeatedly has rejected attempts to shift an earlier discriminatory intent onto a later non-discriminatory act that merely perpetuates and gives present effect to the earlier intent. See, *e.g.*, *Evans*, 431 U.S. at 558 (employee argued she was challenging her seniority instead of her earlier forced resignation); *Ricks*, 449 U.S. at 257 (employee argued he was challenging the termination of his contract, rather than the earlier discriminatory denial of tenure). Indeed, that assertion was the principal argument rejected in *Evans*. See 431 U.S. at 557-558.

Respondents argue that they could not have sued before their benefits were calculated because a discriminatory maternity-leave policy is not an adverse employment practice in violation of Title VII until benefits are actually calculated under that policy. In their brief in opposition (at 10 n.3), however, respondents asserted that petitioner's pre-PDA leave policies themselves "arguably" constituted an "unlawful employment practice" that violated Title VII, thereby effectively acknowledging that respondents could have filed suit at the time they were required to take personal leave for their pregnancies. Their complaint similarly asserted that petitioner's pre-PDA maternity leave policies violated Title VII. Compl. 16-17 (¶ 88). Not until their supplemental brief at the certiorari stage (at 11) did respondents argue that petitioner's disparate treatments of pre-PDA leaves on account of pregnancy were simply "precursor decisions," akin to performance evaluations, "that [were] not themselves completed violations of Title VII

subject to immediate challenge." This Court does not ordinarily consider arguments that were not pressed or passed upon below, and there is no reason to do so here.

In any event, respondents' argument should be rejected. Respondents could have challenged petitioner's pre-PDA policies before the passage of the PDA because those policies gave women less NCS credit for pregnancy than for other temporary disabilities. That result had the immediate effect of placing pregnant women in an inferior position vis-a-vis other employees for future service-related decisions including job bidding, vacation time, and retirement benefits. Pet. App. 4a; Compl. 6-8 (¶ 29(a)-(d)) (cataloging adverse effects of leave policy). Respondents were thus entitled to sue when the policy was adopted and were not required to wait until the policy was applied with respect to a particular benefit determination.

Lorance likewise makes clear that the adoption of a discriminatory policy for accruing seniority constitutes a "concrete harm" even though at the time of adoption the effects of the policy are "by their nature speculative." 490 U.S. at 907 n.3; *Riva* v. *Massachusetts*, 61 F.3d 1003, 1009-1013 (1st Cir. 1995) (finding ripe a claim brought by an employee whose retirement benefits would be reduced eight-plus years after he sued). Accordingly, respondents were not entitled to wait to sue at "the point at which the injury becomes 'most painful.'" *Lorance*, 490 U.S. at 907 n.9 (quoting *Ricks*, 449 U.S. at 258).

B. Section 706(e)(2) Does Not Aid Respondents

1. Both the Ninth Circuit (Pet. App. 19a-20a) and respondents (Br. in Opp. 14-15; Supp. Br. 8-10) rely on 42 U.S.C. 2000e-5(e)(2), quoted on p. 3, *supra*, in arguing that respondents were free to challenge their benefit calculations when they were made between 1994 and 2000. That

reliance is misplaced. Section 706(e)(2) was enacted by Congress in 1991 in response to this Court's decision in *Lorance* and, as this Court recently recognized, the provision was designed "to cover the specific situation involved in that case," *Ledbetter*, 127 S. Ct. at 2169 n.2, *i.e.*, the adoption of a seniority system "for an intentionally discriminatory purpose in violation of [Title VII]." 42 U.S.C. 2000e-5(e)(2); *Lorance*, 490 U.S. at 903. Section 706(e)(2) thus has no application to the seniority system at issue here.

Petitioner here did not adopt or alter its seniority system "for an intentionally discriminatory purpose in violation of [Title VII]." 42 U.S.C. 2000e-5(e)(2). To the contrary, when petitioner adopted its pre-PDA pregnancy leave policy, that policy was lawful under Title VII (see *Gilbert*, *supra*), and when Congress enacted the PDA, petitioner *eliminated* its prior leave policy and adopted a policy that credits pregnancy leaves on the same terms as leaves for other temporary disabilities. Unless the PDA is to be given retroactive effect, petitioner's failure to adjust service dates to credit pre-PDA pregnancy leaves retroactively did not intentionally violate the PDA, either on the effective date of the PDA or thereafter as petitioner calculated benefits based on NCS dates based in part on pre-PDA leaves. Pet. App. 56a (O'Scannlain, J., dissenting) ("[B]ecause the PDA is not retroactive, * * * [petitioner] 'would have no reason to think it had to reshuffle its NCS list after the Act was passed,' and therefore the continued reliance on the unadjusted NCS date cannot constitute intentional discrimination.") (internal citation omitted) (quoting *Ameritech*, 220 F.3d at 823). Section 706(e)(2) therefore is not applicable.

Respondents' argument to the contrary (Supp. Br. 10-11) fails. Respondents assert that "[t]he phrase 'in violation of [Title VII]' is best read to modify 'intentionally discriminatory purpose,'" rather than "the earlier word 'adopted.'"

Supp. Br. 10. Under this proposed reading, a party may challenge a seniority system at any time if the employer's purpose for adopting the policy is determined to violate Title VII's *current* prohibitions, even if the purpose was entirely lawful at the time of the seniority system's adoption. See Supp. Br. 10 ("[T]he provision allows plaintiffs to challenge at any time a seniority system adopted for a purpose proscribed by Title VII at the time of the challenge."). That reading is untenable. The phrases "for an intentionally discriminatory purpose" and "in violation of [Title VII]" are part of a single explanatory phrase, both of which modify the operative statutory term "adopted."

The statute thus permits actions against seniority systems "adopted for an intentionally discriminatory purpose in violation of [Title VII]"—*i.e.*, seniority systems that intentionally violate Title VII at the time they are adopted. See Pet. App. 61a-63a (O'Scannlain, J., dissenting). A contrary reading would give an impermissible retroactive effect to the PDA as it would force employers to recalculate NCS dates made before the PDA was passed. That result not only would contravene the settled understanding that statutes should not be given retroactive effect unless Congress clearly says so, but would extend far beyond Congress's limited purpose in enacting Section 706(e)(2) to overrule the specific result in *Lorance* and would directly conflict with the prospective-only effect of the PDA.

2. Respondents' assertion that the government's reading of the statute "would lead to absurd results and easy evasion of *Lorance* and Section 706(e)(2)" (Supp. Br. 9) also is without merit. The government's interpretation would not, as respondents contend, permit an employer to utilize a seniority system that gives women "half the seniority credit given to men for each day of service." Supp. Br. 9. Such a system would be facially discriminatory, and,

as noted above, could be challenged at any time under *Lorance*. See 490 U.S. at 912 & n.5 ("[A] facially discriminatory seniority system (one that treats similarly situated employees differently) can be challenged at any time.").

Nor would the government's reading of the statute permit an employer to maintain "a *Bazemore*-like system * * * for years," only to change the system "before pensions became due and insist that neither *Lorance* nor Section 706(e)(2) applied because its system was no longer facially discriminatory." Resp. Supp. Br. 9. Assuming that "a *Bazemore*-like system in which black employees were given no seniority credit at all before the effective date of Title VII" continued after the effective date of Title VII, as respondents suggest in their hypothetical (*ibid.*), such a facially-discriminatory system would have become actionable upon Title VII's effective date, just as the discriminatory pay scale at issue in *Bazemore* immediately became actionable, *Bazemore*, 478 U.S. at 395, and would remain actionable under *Lorance*. 490 U.S. 912 & n.5.[6] And to the extent respondents assert that an employer utilizing a *Bazemore*-like system would be required retroactively to award seniority credit for the period before Title VII's effective date, that argument is foreclosed by *Bazemore* itself, which did not permit recovery for pre-enactment pay disparity. See *Bazemore*, 478 U.S. at 395 ("While recovery may not be permitted for pre-1972 acts of discrimination, to

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[6] Indeed, as noted by the en banc dissent, the existence of such a factual scenario would be controlled by *Bazemore*. Pet. App. 51a-52a ("*Bazemore* would only be analogous in this case if [petitioner] had continued to deny full NCS seniority credit to female employees who had taken pregnancy leave after the enactment of the PDA and attempted to defend that practice on the ground that it began before the enactment of that Act.").

the extent that this discrimination was perpetuated after 1972, liability may be imposed.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

AT&T CORPORATION, PETITIONER,

v.

NOREEN HULTEEN, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE *NINTH CIRCUIT*

BRIEF OF *AMICUS CURIAE* AARP IN SUPPORT OF RESPONDENTS URGING AFFIRMANCE

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STATEMENT OF INTEREST[1]

AARP is a nonpartisan, nonprofit membership organization of more than 40 million persons age 50 or older, that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.[2]

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[1]The parties have consented to the filing of this brief. *Amicus curiae* AARP states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2]As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving these protections, including the scope of a fiduciary's duties, the appropriate standard of judicial review of plan administrators' benefit eligibility determinations under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and the scope of remedies available under ERISA's civil enforcement provisions. *See, e.g.*, Brief *Amicus Curiae* of AARP in Support of Respondent

Due to the vulnerability of retired persons, ensuring that retiring employees receive the full pension to which they are entitled is a top priority of AARP. The issues in this case directly bear on an employer's responsibility to provide all employees–both male and female–the retirement benefits that they earned. Thus, resolution of the issues in this case will have a significant impact on the way in which employers handle pension benefits and the extent to which employees can rely on the promises of their employees to provide those retirement benefits. AARP, therefore, respectfully submits this brief *amicus curiae* to facilitate the Court's decision in this case.

Urging Affirmance, *Metlife (Metropolitan Life Ins. Co.) v. Glenn*, No. 06-923, 2008 WL 899290 (U.S. Mar. 31, 2008); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. __, 128 S.Ct. 1020 (2008); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc); *Milofsky v. Am. Airlines*, 442 F.3d 311 (5th Cir. 2006); *In re Schering-Plough ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005); *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003).

SUMMARY OF ARGUMENT

The Court should uphold the Ninth Circuit's *en banc* decision that AT&T's post-Pregnancy Discrimination Act ("PDA") calculation of retirement benefits for Respondents violated the PDA. *Hulteen v. AT&T Corp.*, 498 F.3d 1001, 1015 (9th Cir. 2007). Issues pertaining to damages in this case should not now be considered because the question before the Court is limited to AT&T's liability for the Title VII violations. However, if the Court considers the concerns raised by Petitioner's *amici*, then the Court needs also to consider that it is essential to vigorously protect the pensions that women accumulate throughout their working lives due to distinct disadvantages that women entering retirement face. Moreover, affirming AT&T's liability will not have the dire effects warned of by Petitioner's *amici*. Finally, contrary to the claims asserted in the brief of *amicus curiae* the ERISA Industry Committee, the minimum funding standards in the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, do not limit the district court's power to award relief to Respondents for AT&T's current Title VII and PDA violations in the calculation of Respondents' pension benefits.

ARGUMENT

I. THE COURT SHOULD NOT ADDRESS ISSUE OF DAMAGES BECAUSE THAT ISSUE IS NOT BEFORE THE COURT.

The ERISA Industry Committee ("ERIC") references the potential harms that *could* result from "a judicial decision leading to an increase in the plan's benefit obligations," citing a "significant risk that the plan will have insufficient resources to cover the new obligations." ERIC Br. 4. However, this argument is unfounded speculation and it comes prematurely. On appeal, the Court is determining whether AT&T is liable for a current violation of the PDA in computing the retirement benefits of female employees who took maternity leaves prior to the passage of the PDA. This is a question of AT&T's liability and thus it is a determination that must be made prior to any consideration of appropriate relief. Consequently, abstract analysis of the financial aspects and claimed threat to the financial soundness of AT&T's pension system is premature and improper.

The district court has yet to address the issue of proper relief in this case. Indeed, the district court made clear that the litigation in the case would proceed in three phases:

> The case is currently situated in Phase I, and the present summary judgment motions are

> the vehicle to determine initial liability. Phase II will concern secondary liability and class certification issues, should any of plaintiffs' claims remain after summary judgment and subsequent appeals. Phase III will then address the issue of damages.

Hulteen v. AT&T Corp., No. C-01-1122 MJJ, 2003 WL 25777891, at *1 (N.D. Cal. Aug. 11, 2003). In its 2007 *en banc* decision, the Ninth Circuit affirmed only the district court's grant of summary judgment in favor of Respondents on their Title VII claims. *Hulteen*, 498 F.3d at 1015 (9th Cir. 2007).

The district court has not developed a record on the question of what damages would be appropriate, and therefore the Court should not address this issue prematurely. *See Glover v. United States*, 531 U.S. 198, 205 (2001); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998). It is a well-established principle that the Court does not "decide questions neither raised nor resolved below" or "decide issues outside the questions presented by the petition for certiorari." *Glover*, 531 U.S. at 205. The question of what remedy would be appropriate in the event of liability is one properly addressed in the first instance by the district court. *Bestfoods*, 524 U.S. at 72-73. Should the issue of liability be resolved in favor of Respondents, this case should be remanded to the district court on the issues of secondary liability, class certification, and damages

in accordance with the separate phases outlined by the district court below. *See Hulteen*, 2003 WL 25777891, at *1.

The district court had no opportunity to review evidence and make findings as to the effect that the requested relief may have on the pension plan of AT&T or employers generally. Further, where there is no legitimate concern that awarding benefits against a plan would compromise the plan's actuarial soundness, courts have routinely awarded such benefits. *See, e.g.*, *Mendez v. Teachers Ins. & Annuity Ass'n. & Coll. Ret. Equities Fund*, 982 F.2d 783, 789 (2d Cir. 1992) (awarding attorneys fees against pension fund in ERISA action); *Novella v. Westchester County, N.Y. Carpenters' Pension Fund*, No. 02 Civ. 2192(BSJ)(JCF), 2007 WL 2582171, at *3 (S.D.N.Y. Sept. 10, 2007) (awarding benefits against a plan and rejecting argument that to do so would "wreak havoc with Taft-Hartley Funds, such as defendant, which rely on actuarial soundness for their very continued existence"); *Adams v. Brink's Co.*, 372 F. Supp. 2d 854, 908 (W.D. Va. 2005) (refusing to require participant to repay overpaid funds to the plan where "the entire blame for the miscalculations of [the participant's] early retirement benefits lies with the Pittston Plan and with the Pittston employees who were entrusted with the task"); *Arnold v. Storz*, No. 00-CV-4485 (CBA), 2005 WL 2436207, at *8 (E.D.N.Y. Sept. 30, 2005) (awarding benefits against a plan where "there are assurances that the actuarial soundness of the

fund is not in jeopardy"). Therefore, if the district court finds that an award to Respondents in this case would not upset the actuarial soundness of AT&T's pension plan and an award in other similar cases would not upset the actuarial soundness of the pension plans of other employers, then the district court can award the requested relief. Because the record contains no basis for a determination on that point, then it is premature for the Court to address the issue of damages.

II. THE COURT HAS OPENED THE DOOR FOR AN AWARD OF DAMAGES TO REMEDY SIMILAR TITLE VII VIOLATIONS.

If the Court does respond to the highly charged protest about a damages award in this case, then it should consider the compelling precedent that allows an award of damages to remedy similar Title VII violations.

Remedying injuries caused by employment discrimination is the purpose of Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The plain language of the statute as well as the legislative history give effect to this purpose. *Moody*, 422 U.S. at 419 & n.11. As a result, upon a finding of liability, a court must fashion an award to remedy the violation of Title VII . *See Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1093 (1983) ("Absent

special circumstances a victim of a Title VII violation is entitled to whatever retroactive relief is necessary to undo any damage resulting from the violation."); *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 703, 719 (1978) ("The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate."); *Moody*, 422 U.S. at 421 ("[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.").

The district court here has had no opportunity to determine how the actuarial balance of AT&T's plan would be affected by awarding the Respondents their requested relief. The ERISA Industry Committee (ERIC) cites to *Florida v. Long*, 487 U.S. 223 (1988), *Norris*, and *Manhart* to support its argument that the Respondents should have no remedy for AT&T's violation of their rights under Title VII.[3] But ERIC reads these cases too broadly.

The plaintiffs in *Manhart* were female employees of the Los Angeles Department of Water

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[3] Notably, in the cases cited in ERIC's brief, the district courts had already awarded relief; this Court was reviewing the propriety of the remedies awarded. *See Norris*, 463 U.S. at 1079; *Long*, 487 U.S. at 228-29; *Manhart*, 435 U.S. at 718.

and Power ("Department") and their union, the International Brotherhood of Electrical Workers, Local Union No. 18, who challenged the Department's requirement that female employees make 14.84% larger contributions than male employees to their pension fund. *Manhart*, 435 U.S. at 704-05. Although the Department awarded equal monthly retirement benefits to male and female employees of the same age, seniority and salary, the Department required this larger contribution from female employees based on actuarial calculations that took into account women's longer average life expectancy. *Id.* at 705. The plaintiffs brought suit against the Department for violating the provision of the Civil Rights Act of 1964 that makes it unlawful for an employer to discriminate against any individual on the basis of sex. *Id.* at 704, 706. The Court held that this employment practice was "in direct conflict with both the language and the policy of the [Civil Rights Act of 1964]." *Id.* at 711. Nevertheless, the Court declined to award damages in that case, citing to the harm that would result from requiring pension funds to shoulder such an unexpected burden. *Id.* at 723. The Court noted that "the prohibition against sex-differentiated employee contributions represent[ed] a marked departure from past practice." *Id.* at 722.

In *Norris*, the State of Arizona permitted employees interested in enrolling in a retirement plan to select from one of a number of companies with which the employee could invest his or her

funds. *Norris*, 463 U.S. at 1075-76. The State was responsible for withholding the appropriate amount of the employee's wages and sending that withholding to the company chosen by the employee. *Id.* at 1077. The Court relied on *Manhart* to hold that an employer may not offer its employees retirement benefits from a private insurance company that used sex-based mortality tables to calculate monthly retirement benefits, but it declined to allow relief for pre-*Manhart* violations. *See id.* at 1074-75, 1105-07.

Finally, in *Long*, the Court contended with the propriety of awarding compensation for the underpayment of pension benefits to employees based on the use of sex-based actuarial tables. *See Long*, 487 U.S. at 227-29. *Long* involved the State of Florida's employee retirement program, which was funded by contributions from state and local government employers with equal contributions for male and female employees who had the same age, seniority and service. *Id.* at 227. Due to the use of sex-based actuarial tables, the equal contributions resulted in the unequal payments of benefits to male and female employees. *Id.* at 227. After the decision in *Norris,* the Florida program adopted unisex actuarial tables that required equal contributions and paid out equal benefits to similarly-situated male and female employees. *Id.* at 227-28. Additionally, the class of employees in *Long* all retired before *Norris*. *Id.* at 240. The Court

reasoned that on this basis the employees were not entitled to relief. *Id.* at 240.

A. The EEOC Has Recognized That the Period for Gradual Adjustment to Title VII's Demands Has Passed.

The ERIC brief cites to *Manhart* for the proposition that the EEOC has recognized that administrators of retirement plans should be given adequate time to "adjust gradually to Title VII's demands." ERIC Br. 11 (citing *Manhart*, 435 U.S. at 721-22). *Manhart* was decided in 1978. Given that Title VII was enacted in 1964 and ERISA was enacted ten years later in 1974, *Manhart* came before the Court when those two laws for the protection of females in the workplace were still in their formative stages and employers were still adjusting to their new requirements. But thirty years beyond *Manhart*, employers, as well as the EEOC, have had the time to adjust.

In fact, in 2002 the EEOC filed a suit on behalf of current and former female employees against Bell Atlantic Corporation (now Verizon) for violations of Title VII and the PDA in U. S. district court in the Southern District of New York. *See EEOC v. Bell Atlantic Corp.*, Nos. 97 Civ. 6723(DC), 98 Civ. 3427(DC), 99 Civ. 5197(DC), 2002 WL 31260290, at *1-2 (S.D.N.Y. Oct. 9, 2002). The EEOC alleged that prior to 1979, defendants had certain discriminatory policies that, among other

things, denied service credits to female employees during pregnancy leave. *Id.* at *1. When defendants implemented a Force Adjustment Plan Retirement Incentive ("FAP") in 1994, which calculated retirement benefits in part on an employee's length of service, some females were ineligible for benefits under the FAP because they were not credited with their pre-1984 pregnancy leaves. *Id.*

In the settlement agreement approved by the court, Verizon agreed to provide additional service credits to the class members, which would increase the class members' pension benefits. *Id.* at *2. Although the settlement agreement does not allow each class member to recoup all of her lost time while on pre-1984 pregnancy leave, the terms of the settlement require defendants to pay money damages to the class members. *See id.* at *2-3. In fact, as of 2006, Verizon is anticipated to pay approximately $48.9 million to 12,326 current and former female employees. Press Release, The U.S. Equal Employment Opportunity Comm'n, Class of Women to Receive $48.9 Million in EEOC-Verizon Pregnancy Bias Settlement (June 5, 2006), *available at* http://www.eeoc.gov/press/6-05-06a.html. Verizon's 2007 operating revenues totaled $93,469,000,000. VERIZON COMMUNICATIONS, 2007 ANNUAL REPORT 17 (2008), *available at* http://investor.verizon.com/financial/quarterly/pdf/07_annual_report.pdf. To put this settlement in perspective, this payout represents only .052% of Verizon's operating revenue for 2007.

B. Petitioners Offer No Evidence That There Will Be Large Scale Recalculations Required by a Grant of Relief in this Case.

Another distinguishing factor of *Manhart* and its progeny is that in those cases the Court was faced with benefit recalculations on a massive scale. Because the practice of requiring females to contribute more to pension funds than males was so widespread, a damages remedy to correct the problem would have required a significant number of employer-sponsored pension funds to recalculate the benefits accrued by all its female employees over their entire careers. *See Manhart,* 435 U.S. at 721 (noting that, at the time, "[f]ifty million Americans participate[d] in retirement plans other than Social Security"). Although the Court in *Manhart*, did not provide specific data as to how many employers would be affected by its decision, the Court cited to the "danger of 'staggering damage awards'" that could result from granting relief to make up for gender-based pension plan calculations. *Manhart,* 435 U.S. at 723. Additionally, in *Long*, the Court concluded that awarding damages for past violations of Title VII was inequitable in that case. *Long*, 487 U.S. at 235. The Court relied on hard data to make this conclusion. First, the Court cited to a survey of Fortune 500 companies that showed that nearly 40% of those companies had used unlawful tables prior to *Norris*. *Id.* at 236. Furthermore, the Court cited to a Department of Labor study that found that

"substantial percentages" of pension plans used the sex-based mortality tables in calculating pension benefits estimating that 74% of participants in defined contribution plans and 45% of participants in defined benefit plans received benefits on these calculations. *Id.* at 233-34.

But in the current case there is simply no evidence in the record that the recalculations requested by the Respondents would have any such large scale effect, and Petitioner's *amici* do not provide any specific data to this effect in their briefs. In reality, three key facts significantly limit the scope of the rule established below. First, the only employees who would benefit from this rule are women who both took pre-PDA pregnancy leave and have recently retired or are eligible to retire in the future. This is in stark contrast to the *Manhart* rule, which would have applied to all women whose pension benefits were calculated in the manner struck down in that case. Second, any leave to which this rule would apply was likely only for brief periods of time—the duration of pregnancy-related disability. In contrast, the *Manhart* rule would have applied to all pension credits accrued by women over their entire careers. Finally, the rule below might only apply to a narrow group of employers—those who, like AT&T, both (a) denied service credit to women on pre-PDA pregnancy-related leave while awarding such credit to employees on non-pregnancy-related short-term disability leave and (b) calculated benefits after 1979 based on a service

credit accrual policy in effect before the PDA became effective. There is neither evidence in the record regarding how many women, how much leave time, and how many employers would be affected here, nor have *amici* offered any such information. Thus, there is no basis upon which to determine at this stage what the impact of the rule articulated below would be.

C. Application of the *Long* Criteria Supports the Argument that Respondents' Entitlement to Relief.

In *Long*, the Court spelled out three criteria "for determining whether retroactive awards are appropriate in Title VII pension cases involving the use of sex-based actuarial tables." *Long*, 487 U.S. at 230. In using the concept of "retroactive award," the Court is merely referring to a grant of relief for past Title VII violations. The ERIC brief cites to the three criteria spelled out in *Long* to advance the argument that the award of damages for past violations of the PDA would be improper. The first criterion is "whether the decision established a new principle of law, focusing, in this context, on whether *Manhart* clearly defined the employer's obligations under Title VII with respect to benefits payments." *Long*, 487 U.S. at 230. That it is unlawful to deny any female employee service credits for pregnancy-related disability leave in the computation of her retirement benefits is now beyond argument. 42 U.S.C. § 2000e(k); *see Pallas v. Pacific Bell*, 940 F.2d

1324, 1326 (9th Cir. 1991). ERIC argues that the unlawfulness of denying service credits to female employees who took pre-PDA pregnancy leave was not established when the cap on service credits for female employees taking pregnancy leave was implemented (pre-PDA). That is not the issue here, which is instead concerned with the unlawfulness of denying the service credits *now that the retirement benefits are being computed.* The unlawfulness of making post-Title VII decisions regarding benefits on discriminatory pre-Title VII calculations is clearly established. *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (holding employer liable for violation of Title VII for paying black employees less than white employees after the enactment of Title VII even though that pattern of behavior began before enactment of Title VII). If liability is upheld, no new principle of law will be established. Indeed, Petitioners's liability has been clear since at least 1991. *Pallas,* 940 F.2d at 1327 (relying on *Bazemore* to hold that the district court erred in dismissing Pallas' claim that her employer violated the PDA for its post-PDA decision to discriminate against its employee for pre-PDA computation of employees' service credits).

The second *Long* criterion is "to test whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance." *Long*, 487 U.S. at 230. Here, the awarding of damages is necessary to the operation of Title VII because it would require

that AT&T *not* violate the PDA by applying a pre-PDA service computation to a current computation of pension benefits. Moreover, a grant of relief in this case would deter "grudging compliance" of other employers who are computing the retirement benefits of female employees who took pre-PDA pregnancy leaves. Additionally, granting relief to Respondents will require AT&T's pension plan to make redress for its improper denial of service credit to the named plaintiffs as well as to the class members. Verizon is expected to pay $48.9 million. See supra 13. Other companies will be apprised of the result in this case, and they can start to plan for readjusting their own pension funds to account for future payments that will have to be made to similarly-situated female employees.

The final *Long* criterion is "to ask whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by our decision." *Long*, 487 U.S. at 230. This criterion shows that this question is premature, since no one knows how a finding of liability will affect employers or pension funds. Petitioners neither present information on what kind of costs the imposition of liability would impose on the fund nor project exactly how many employees would be affected by an award of damages. Based upon the current record, it is beyond the power of the litigants, much more *amici*, to protest that an award of damages would produce "inequitable results."

III. THE PENSIONS THAT WORKING WOMEN EARN MUST BE VIGOROUSLY PROTECTED.

Although consideration of damages in this case is premature, should the Court consider damages, it should undertake to do so in light of the particular needs of women in retirement. As compared to men, women in general have less access to financial resources in retirement but will need more resources than men. Consequently, women who are forced to rely on public resources—such as the Social Security system, food stamps, etc.—will not have enough resources for an adequate level of retirement security. In refusing to credit Respondents for their time worked and denying Respondents the full pension benefits to which they should be entitled, AT&T, by failing to provide equal pension benefits for equal work, is shifting the burden of its responsibility for an adequate level of retirement security onto public programs that are neither intended nor equipped to handle such demands.

The availability of financial resources in retirement depends in large part on a woman's labor market participation. SUNHWA LEE & LOIS SHAW, AARP PUB. POLICY INST., INST. FOR WOMEN'S POLICY RESEARCH, 2008-03, FROM WORK TO RETIREMENT: TRACKING CHANGES IN WOMEN'S POVERTY STATUS 2-3 (2008). Although women have made great strides in improving their labor force participation during the

past half century, their participation continues to be more intermittent than the labor force participation of men. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-105, RETIREMENT SECURITY: WOMEN FACE CHALLENGES IN ENSURING FINANCIAL SECURITY IN RETIREMENT 12 (2007) [hereinafter GAO REPORT]. Moreover, the work experience that women do have does not necessarily translate into higher income in retirement. LEE & SHAW, *supra,* at 3. Therefore, it is crucial that women be awarded the full pension benefits to which their work history entitles them.

Despite the difficulties in securing adequate retirement income, women in our nation have a great need for retirement security. Their special circumstances are created by a variety of factors that generate this need. Married women tend to outlive their husbands, which contributes to the need for more resources in retirement. LESLIE E. PAPKE ET AL., THE RETIREMENT SECURITY PROJECT, NO. 2008-1, RETIREMENT SECURITY FOR WOMEN: PROGRESS TO DATE AND POLICIES FOR TOMORROW 17 (2008), *available at* www.retirementsecurityproject.org/pubs/File/RSP-PB_Women_FINAL_4.2.2008.pdf ("[W]omen will have greater need for retirement resources because they tend to outlive their husbands, face a decline in income at widowhood and incur out-of-pocket medical expenses from their husband's death or their own medical needs."). For both married and single women, an increase in health costs during aging requires greater retirement resources. GAO REPORT, *supra*, at 28

(attributing women's longer life spans to requiring more long-term care and consequently the financing for that care); CINDY HOUNSELL, WOMEN'S INSTITUTE FOR A SECURE RETIREMENT, THE FEMALE FACTOR 2008: WHY WOMEN ARE AT GREATER FINANCIAL RISK IN RETIREMENT AND HOW ANNUITIES CAN HELP 13-14 (2008), *available at* http://www.paycheckforlife.org/whitepapers (go to "The Female Factor 2008" heading, click on link that says "[t]o read more, please click here") (attributing an increase in elderly women's health costs to caring for a spouse and caring for themselves and citing studies that show that women are more likely to enter nursing homes and are less likely to have a family care-giver to care for them); LEE & SHAW, *supra,* at 4. Additionally, women live longer and as a result require that their financial resources extend longer. *See* GAO REPORT, *supra,* at 28; HOUNSELL, *supra,* at 14 (describing the challenges than many women face in effectively planning for a retirement that can last twenty to thirty years or more).

Retirement income for both men and women come from a number of sources, including Social Security and other public resources, pensions, savings, and earnings from work. KE BIN WU, AARP PUB. POLICY INST., DD 161, SOURCES OF INCOME FOR WOMEN AGE 65 AND OLDER 1 (2007). For women, pensions are a critical source because of the unreliability and inadequacy of the other sources. First, the social security system and other public resources are inadequate to provide long-term

retirement financing to retirees. GAO REPORT, *supra*, at 9 (attributing the shortfall to "longer life spans and lower birthrates"). Despite this inadequacy, older persons (especially among the group age 50 to 64) living in poverty rely heavily on public benefits like Medicaid, Supplemental Security Income, public housing, and food stamps. AARP FOUND. & AARP PUB. POLICY INST., POVERTY & AGING IN AMERICA: PROFILES OF THE LOW-INCOME OLDER POPULATION 4 (2008) [hereinafter POVERTY & AGING IN AMERICA]. Women are generally, although not always, more likely than men to receive these public benefits. *Id.*

Savings is also not adequate. Few Americans are actually saving, *see* GAO REPORT, *supra*, at 10 (reporting that the U.S. personal saving rate has fallen to levels not seen since the Great Depression), and historically, women do not save as much as men. GAO REPORT, *supra*, at 10. A woman's traditional role as mother and provider of childcare—a role that undeniably benefits society—can limit her ability to save. Child care and elder care obligations can cause a woman to take years away from the work force or to limit her work force participation to part-time work. POVERTY & AGING IN AMERICA, *supra*, at 23; WU, *supra*, at 3.

Finally, earnings from work do not constitute a reliable source of retirement income. Although women in retirement work for a number of reasons (including financial need and enjoyment of work),

the percentage of women receiving earnings from work was a mere 13.4 percent in 2005. WU, *supra*, at 3-4 (citing the U.S. Bureau of the Census March 2006 survey).

The customary lifetime work pattern for women described above leaves one component of the catalogue of financial resources that can be significant in retirement: pensions. Despite great gains in labor market participation, however, women historically receive far less in pensions than men receive. Although the statistics vary a bit, studies have shown that a typical woman receiving a pension receives about half what a man receives. GAO REPORT, *supra*, at 14 (citing a 2004 study that reports that the median pension income for men was $12,000 and the median pension income for women was $6,141); INST. FOR WOMEN'S POLICY RESEARCH, IWPR #D480, THE ECONOMIC SECURITY OF OLDER WOMEN AND MEN IN THE UNITED STATES 1 (2007) (stating that for women who receive pensions, the typical woman receives about $6,388 while the typical man receives about $11,971). *See also* Ken McDonnell, *Retirement Annuity and Employment-Based Pension Income, Among Individuals Age 50 and Over: 2006,* EMPLOYEE BENEFIT RESEARCH INSTITUTE NOTES, January 2008, at 3, *available at* www.ebri.org/publications/notes (click on "January 2008") (describing a study showing that, in comparing women who receive pension benefits to males, the mean benefit of the woman would be only 65% of that received by a man in the same group).

Despite their demonstrated greater need and the variety of sources from which they can accumulate retirement income, women do not have as much retirement income as men. WU, *supra*, at 1; GAO REPORT, *supra*, at 12 (citing to women's "lower labor force attachment and lower earnings" as the reason for not having as much retirement income). In fact, upon entering retirement, women are at a substantially greater risk of poverty than men, despite declining poverty rates in the elderly population since the 1960s. LEE & SHAW, *supra,* at 2.

Consequently, older women constitute a very vulnerable population. They live longer so they require more financial resources in retirement; however, they are frequently not able to rely on their pensions in retirement. As a result, the pensions that women do accumulate must be vigorously protected. AT&T has the responsibility to Respondents to award them pension benefits equal to other employees with similar work and credited leave histories.

IV. MINIMUM FUNDING STANDARDS DO NOT LIMIT THE DISTRICT COURT'S ABILITY TO AWARD MONEY DAMAGES TO RESPONDENTS IN THIS CASE.

The briefs of both the ERISA Industry Committee and the Equal Employment Advisory Council argue that the funding of pension plans will be in danger if the Court permits the awarding of

service credits to the Respondents. *See* Equal Employment Advisory Council Br. 20-21; ERIC Br. 15-17. Contrary to this "sky is falling" argument, the funding of pension plans is not an exact science and there is simply no evidence in the record that the adjustments required by the Ninth Circuit's decision will bankrupt the pension system for AT&T or any employer that is required to credit female employees' pre-PDA pregnancy leave.

A. The Court Should Not be Concerned with Upsetting Current Funding Standards Because These Funding Standards Change Frequently.

Both ERISA and the Internal Revenue Code prescribe minimum funding standards for pension plans. *See* ERISA § 303, 29 U.S.C. § 1083; I.R.C. § 430, 26 U.S.C. § 430 (describing minimum funding standards for single-employer defined benefit pension plans); ERISA § 304, 29 U.S.C. § 1084; I.R.C. § 431, 26 U.S.C. § 431 (describing minimum funding standards for multiemployer plans). These rules require that pension plans satisfy the relevant minimum funding standards. ERISA § 302(a), 29 U.S.C. § 1082(a); I.R.C. § 412(a), 26 U.S.C. § 412(a). As a result of ongoing efforts to change and improve these funding standards, the minimum standards are constantly changing. *See generally* Kathryn J. Kennedy, *Pension Funding Reform: It's Time to Get the Rules Right (Part 1)*, TAX NOTES, Aug. 22, 2005, at 917-21 (describing the evolution of various

pension funding rules). Because these minimum standards are frequently changed, they should not prevent an award of money damages to Respondents to account for the miscalculation of the length of service of female employees whose pregnancy leaves were not credited in the years prior to the passage of the PDA.

B. Actuarial Assumptions are More Art than Science.

The actuarial assumptions that dictate how a plan will meet the minimum funding standards are more art than science. *See Citrus Valley Estates, Inc. v. Comm'r of Internal Revenue,* 49 F.3d 1410, 1412-13 (9th Cir. 1995) ("Even with the statutory guidelines, however, plan funding often involves more art than science, because the ultimate cost of a plan cannot be calculated in advance with any certainty."); *Rhoades, McKee & Boer v. United States*, 43 F.3d 1071, 1073-75 (6th Cir. 1995) (emphasizing the importance of the actuary's assumptions and grappling with the kind of test to use to evaluate whether an actuary employed reasonable assumptions); *Wachtell, Lipton, Rosen & Katz v. Comm'r of Internal Revenue*, 26 F.3d 291, 296 (2d Cir. 1994) (upholding the tax court's determination that the actuarial assumptions at issue were reasonable "provided that the chosen assumption is the actuary's best estimate of anticipated plan experience"). Because of the uncertainties connected with pension funding, the

pension funding rules require that employers have adequate reserves so that they can handle unforeseen required payments. Any potential harm to pension solvency that a ruling in favor of Respondents *could* cause has not been demonstrated by Petitioner or *amici* in this case.

Plan minimum funding standards must be based on *reasonable* actuarial assumptions. For all plans that are not multi-employer plans, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods

> each of which is *reasonable* (taking into account the experience of the plan and reasonable expectations) or which, in the aggregate, result in a total contribution equivalent to that which would be determined if each such assumption and method were *reasonable* and which, in combination, offer the actuary's *best estimate* of anticipated experience under the plan.

26 U.S.C. § 412(c)(3) (2002); 29 U.S.C. 1082(c)(3) (2002) (emphasis added)[4]. This standard of

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[4] This language references older versions of the U.S. Code. The Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006), modified the placement and language of this rule regarding actuarial assumptions. *See, e.g.*, 29 U.S.C. § 1083(h)(1) (requiring that, for single-employer defined benefit plans, the actuarial assumptions and methods "each of which is reasonable

reasonableness reflects the fact that no actuary is able to predict with absolute certainty the challenges that will affect plan funding. *See Rhoades,* 43 F.3d at 1073.

Consequently, plans must remain flexible so as to be able to satisfy an award of money damages, like the kind requested by Respondents in this case, as part of their responsibility to account for unanticipated events that were not within the actuary's calculations. The AT&T plan—just as all other plans that refuse to include participants' pre-PDA pregnancy leaves—are presumably well able to maintain such flexibility.

(taking into account the experience of the plan and reasonable expectations), and which, in combination, offer the actuary's best estimate of anticipated experience under the plan").

CONCLUSION

The ERISA Industry Committee's brief is at best premature and at worst an excited effort to influence the Court's finding on liability through unfounded speculation that the relief requested, but not yet determined, would wreak havoc on pension fund stability. Because the district court has not developed a record on the question of remedies in this case, nothing but speculation as to the impact of a hypothetical remedy is even possible at this stage. *See Bestfoods*, 524 U.S. at 72-73 (1998).

For the foregoing reasons, the judgment of the Court of Appeals *en banc* should be affirmed.

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AMICUS CURIAE BRIEF

No. 07-543

IN THE

Supreme Court of United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN ; ELEANORA COLLET ; LINDA PORTER ; ELIZABETH SNYDER ; COMMUNICATION WORKERS OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON BEHALF OF CAITLIN BORGMANN, DEBORAH BRAKE, MARTHA DAVIS, JOANNA GROSSMAN, SYLVIA LAW, WENDY PARMET, SUSAN DELLER ROSS, MICHELLE TRAVIS, JOAN WILLIAMS, WENDY WILLIAMS, DEBORAH WIDISS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF ON BEHALF OF CAITLIN BORGMANN, DEBORAH BRAKE, MARTHA DAVIS, JOANNA GROSSMAN, SYLVIA LAW, WENDY PARMET, SUSAN DELLER ROSS, MICHELLE TRAVIS, DEBORAH WIDISS, JOAN WILLIAMS, AND WENDY WILLIAMS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This group of legal scholars respectfully submits this brief as *amici curiae* in support of Respondents. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

Amici curiae, academics representing the fields of law and history, submit this brief in support of respondents. *Amici curiae* are a group of law professors and legal scholars who teach, write, and practice in the area of employment discrimination and gender equality and who share a strong professional interest in issues relating to the effect and scope of Title VII as it relates to sex discrimination and disfavored treatment of pregnancy in the workplace. *Amici* seek to provide this Court with their professional academic perspective on these issues, as they arise in this litigation.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the clerk.

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SUMMARY OF ARGUMENT

Years after the effective date of the Pregnancy Discrimination Act ("PDA"), AT&T set Respondents' pension benefits below what they would have been but for the fact that Respondents had taken medical leave associated with pregnancy and childbirth, as opposed to any other medical condition. Petitioner argues that, under *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), the only relevant unlawful employment practice occurred when, upon their return from pregnancy disability leave, AT&T recorded Respondents' leave, as a matter of internal administration, in a manner that would later be used for a discriminatory pension-setting decision. That is so, AT&T contends, irrespective of whether the recording of leave had *any* contemporaneous effect upon the terms of Respondents' employment. Therefore, according to AT&T, the relevant discriminatory act occurred outside Title VII's limitation period. But under *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007), AT&T's pension-setting decision violated Title VII anew—regardless of whether the prior act of recording Respondent's service credit upon their return to work was a complete, actionable discriminatory act.

AT&T further argues that the decision below gave impermissible retroactive effect to the PDA. That argument is meritless. The pension-setting decisions at issue occurred years after the effective date of the PDA, and enforcing Title VII's guarantee of equality *today*, as confirmed by the PDA, does not give

retroactive effect to the statute simply because the relevant pregnancy leave was taken before the PDA was enacted. Additionally, by the early 1970s, AT&T knew (or should have known) that any pension benefits decision relying on a calculation of days worked that discriminated on the basis of pregnancy would be unlawful. Prior to 1976, it was the uniform view of the federal courts of appeals and the EEOC that such discrimination constituted sex discrimination within the meaning of Title VII. The PDA merely confirmed that that view was correct.

Congress also recognized the reality that an employer's policies concerning pregnancy-related issues can be (and have been) used to hinder women's opportunities in the workplace. The PDA clarified that such policies are contrary to Congress's goal of substantive equality in the workplace. Accordingly, taking its cue from Congress, this Court has eschewed its former formalistic interpretations of Title VII in favor of a more functional approach that is faithful to Congressional intent. Under that approach, AT&T's policy violates Title VII—and would have, had the PDA never been enacted.

ARGUMENT

I. UNDER *LEDBETTER*, THE RELEVANT DISCRIMINATORY ACT WAS THE SETTING OF RESPONDENTS' PENSION BENEFITS

Title VII of the Civil Rights Act of 1964, as amended by the PDA, requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of

benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)). Neither AT&T nor the United States would contest that a post-PDA discriminatory pension-setting decision violates the Act if the employer reviews the worker's file and calculates her term of employment "de novo", giving credit to all kinds of medical leave except pregnancy disability leave. But, AT&T argues, the law applies in a dramatically different way to an employer who happens to keep a running tab on a worker's term of employment service, recording service credits upon the worker's return from leave. In that circumstance, AT&T argues, the unlawful employment practice occurs at the time the service credit is recorded in the employee's file, and future reliance on that data in setting the worker's pension benefits, years later, does not itself violate Title VII. That interpretation is inconsistent with this Court's decision in *Ledbetter*, the text and purpose of the statute, and common sense.

In *Ledbetter*, this Court held that Title VII's prohibition of discrimination "against any individual with respect to his compensation . . . because of such individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1), creates a new cause of action "after each allegedly discriminatory pay decision [is] made." 127 S. Ct. at 2169. That is so, this Court reasoned, because that is the moment at which "discriminatory intent" and "an employment practice" come together. *Id.* at 2171. Here, AT&T's discriminatory intent did not coincide with an actionable employment practice until AT&T used Respondents' improperly-adjusted Net Credited

Service ("NCS") dates to determine their pension benefits upon their retirement.

The Ninth Circuit's interpretation is not only compelled by this Court's decision in *Ledbetter*, but also makes sense. Under AT&T's view, if it had calculated Respondents' years and days of employment for purposes of setting their pension benefits *for the first time* at retirement, rather than relying on a service account of the time worked that had been adjusted on a running-tab basis, Respondents' claims would be, unquestionably, timely. There is nothing in the text or history of the PDA to support an interpretation under which the limitation period of two substantively identical Title VII claims turns purely on serendipity.

II. THE DECISION BELOW DID NOT GIVE THE PDA IMPERMISSIBLE RETROACTIVE EFFECT

A. Construing Title VII To Proscribe Reliance on Past Discriminatory Recording of Service Credit in Setting Post-PDA Pension Benefits Does Not Give the PDA Retroactive Effect.

AT&T advanced Respondents' NCS dates when they returned from leave, according to its policy of denying full credit for pregnancy leaves but granting it for medical leaves taken for other reasons. AT&T argues that because this "adjustment" to Respondents' NCS dates happened before the PDA was enacted, in anticipation of future discriminatory treatment in the setting of their pension benefits, applying the PDA to Respondents would give the PDA retroactive effect. That argument is meritless. A law that applies only

prospectively may nevertheless require a change in the treatment of past events for purposes of present-day (post-enactment) decisions. It was not until Respondents retired, years after the PDA was enacted, that AT&T set their pension benefits, failing to credit them for tenure accrued during pregnancy-related medical leave.

This Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1985) (*per curiam*), illustrates the point. There, this Court held that an employer could not simply continue to rely on its pre-enactment salary structure to set future wages. *Id.* at 396-97. This Court so held, notwithstanding that "the day *before* the [Act] took effect, it was lawful to rely on" the employer's prior discriminatory decisions in setting wages. (Petr. Br. 18). Yet, nowhere in *Bazemore* did this Court suggest that its holding gave Title VII a retroactive effect. And precluding AT&T from blindly relying on its previous adjustment of Respondents' term of employment service certainly does not subject it to liability for "a past act that [it] is helpless to undo." *Fernandez-Vargaz v. Gonzales*, 548 U.S. 30, 44 (2006).

B. In Any Event, As This Court Has Recognized, the PDA Merely Reestablished the Meaning of Sex Discrimination in Title VII, Confirming the Uniform View Among Federal Courts of Appeals That Unfavorable Treatment of Pregnancy Is Sex Discrimination.

Even assuming that, as a general matter, applying a law in a manner that requires an employer to reconsider its treatment of past events for purposes of post-enactment decisions somehow renders that law "retroactive," Petitioner's argument still fails, because, as this Court has recognized, Title VII *always* prohibited the type of unfavorable treatment of pregnancy leave that is at issue in this case. It should have been clear to AT&T at all times that, based on a nearly universal understanding of Title VII, any determination of pension benefits based on an NCS system under which pregnancy leave is treated unfavorably constitutes unlawful sex discrimination. Adopting AT&T's arguments in this case would therefore reward them for ignoring controlling legal authorities and for resisting compliance with Title VII. *See Bazemore*, 478 U.S. at 395.

1. Prior to 1976, the Courts Uniformly Held That an Employer's Failure To Credit Time Taken for Pregnancy Leave to the Same Extent As Other Temporary Disability Leave Constituted Sex Discrimination under Title VII.

Prior to 1976, the courts uniformly understood that crediting pregnancy leave less favorably than other types of medical leave constituted sex discrimination under Title VII. *See Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975) (holding that differential treatment of pregnancy leave for purposes of calculating days worked, which affected employees' calculation of seniority, constituted sex discrimination under Title VII); *aff'd in relevant part, vacated in part*, 434 U.S. 136 (1977); *Commc'n Workers of Am. v. Am. Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975) (finding that district court erred in dismissing complaint, for failure to state a cause of action, that alleged that denying accrual of seniority and other benefits while on temporary disability due to pregnancy and childbirth violated Title VII), *judgment vacated and case remanded for further consideration in light of Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), 429 U.S. 1033 (1977); *Zichy v. City of Philadelphia*, 392 F. Supp. 338 (E.D. Pa. 1975) (holding that less favorable treatment of pregnancy and maternity-related disability leave vis-à-vis other medical leave, for purposes of, *inter alia*, credit for time worked for

future pension benefits constituted sex discrimination under Title VII), *rev'd and remanded*, 559 F.2d 1210 (3d Cir. 1977), *reversal limited*, 590 F.2d 503 (3d Cir. 1979) (remanding to district court to reconsider Title VII claims in light of *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) and other cases, and dismissing argument that that order was prohibited by "law of the case" doctrine); *Satty v. Nashville Gas Co.*, 384 F. Supp. 765 (M.D. Tenn. 1974) (holding that the denial of previously accumulated seniority for the purpose of bidding on job openings for employees returning from pregnancy leave constituted sex discrimination under Title VII), *aff'd in relevant part, vacated in part*, 434 U.S. 136 (1977); *Healen v. Eastern Airlines, Inc.*, No. 18097, 1973 WL 359 (N.D. Ga. Dec. 27, 1973) (denying motion to dismiss claim alleging Title VII violation for failure to credit time on maternity leave for seniority status, accrual of vacation and sick leave time). These decisions were consistent with the general understanding at the time, reflected in dozens of federal court decisions including all courts of appeals to address the matter, that all types of disfavored

treatment of pregnancy violated Title VII's prohibition against sex discrimination.[2]

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[2] *See, e.g., Berg v. Richmond Unified Sch. Dist.*, 528 F.2d 1208 (9th Cir. 1975); *Hutchison v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961 (9th Cir. 1975); *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661 (4th Cir. 1975), *vacated*, 429 U.S. 125 (1976); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 206 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976); *Buckley v. Coyle Pub. Sch. Sys.*, 476 F.2d 92, 95 (10th Cir. 1973); *In re Nat'l Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977); *Purvine v. Boyd Coffee Co.*, No. 75-324, 1976 WL 674 (D. Or. Oct. 26, 1976); *EEOC v. Children's Hosp. of Pittsburgh*, 415 F. Supp. 1345 (W.D. Pa. 1976); *Farris v. Bd. of Educ. of St. Louis*, 417 F. Supp. 202 (E.D. Mo. 1976); *Mitchell v. Bd. of Trustees of Pickens County Sch. Dist. "A,"* 415 F. Supp. 512 (D.S.C. 1976); *Fabian v. Indep. Sch. Dist. No. 89 of Okla. County, Okla.*, 409 F. Supp. 94 (W.D. Okl. 1976); *St. John v. G. W. Murphy Indus., Inc.*, 407 F. Supp. 695 (W.D.N.C. 1976); *EEOC v. Barnes Hosp.*, No. 75-545C(3), 1975 WL 305 (E.D. Mo. Dec. 22, 1975); *Stansell v. Sherwin-Williams Co.*, 404 F. Supp. 696 (N.D. Ga. 1975); *Oakland Fed'n of Teachers v. Oakland Unified Sch. Dist.*, No. C741768WTS, 1975 WL 210 (N.D. Cal. July 16, 1975); *Liss v. Sch. Dist. of City of Ladue*, 396 F. Supp. 1035 (E.D. Mo. 1975); *Sale v. Waverly-Shell Rock Bd. of Educ.*, 390 F. Supp.784 (N.D. Iowa 1975); *Vineyard v. Hollister Elementary Sch. Dist.*, 64 F.R.D. 580 (N.D. Cal. 1974); *Singer v. Mahoning County Bd. of Mental Retardation*, 379 F. Supp. 986 (N.D. Ohio 1974), *aff'd on other grounds*, 519 F.2d 748 (6th Cir. 1975); *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *vacated*, 429 U.S. 125 (1976); *Farkas v. South Western City Sch. Dist.*, No. C27369-1, 1974 WL 225 (S.D. Ohio Apr. 8, 1974); *Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3d Cir. 1975); *Newmon v. Delta Airlines, Inc.*, 374 F. Supp. 238 (N.D. Ga. 1973); *Lillo v. Plymouth Local Bd. of Educ.*, No. C 73-184-Y, 1973 WL 343 (N.D. Ohio Oct. 3, 1973); *Schattman v. Tex. Employment Comm'n et al.*, 330 F. Supp. 328 (W.D. Tex. 1971). *But see Rafford v. Randle E. Ambulance Serv., Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972).

These decisions were also in line with the authoritative guidelines issued by the EEOC in 1972, which were entitled to "great deference" by courts in interpreting the contours of Title VII. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

The EEOC's 1972 guidelines made clear that, for purposes of crediting days worked, any policy that failed to provide at least equal treatment for pregnancy-related leave as compared to other disability leave would constitute sex discrimination under Title VII. It stated in pertinent part:

> Written or unwritten employment policies and practices involving matters such as . . . the accrual of seniority and other benefits and privileges . . . shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.

29 C.F.R. 1604.10(b) (1975).

By the early 1970s, therefore, employers were on notice that policies that did not count pregnancy leave the same way as other medical or disability leaves violated Title VII's prohibition on sex discrimination. Indeed, the primary purpose of EEOC guidelines was

to put employers and employees on notice as to whether they could expect the EEOC to seek enforcement in court. *See Intlekofer v. Turnage*, 973 F.2d 773, 778 (9th Cir. 1992) (holding that employer should have known to put an end to sexual harassment practices because it had long been on notice that, under the EEOC Compliance Guidelines and case law of neighboring circuit courts, Title VII required it to do so); *see also LeBeau v. Libbey-Owens-Ford Co.*, 799 F.2d 1152, 1162 (7th Cir. 1986) ("[T]he [EEOC] guidelines put defendants on notice that such conduct would not be considered lawful."); *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 730 (1978) (Marshall, J., concurring in part and dissenting in part) ("[C]onscientious and intelligent [pension plan] administrators . . . should have responded to the EEOC's guidelines.").[3]

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[3] The United States argues that Petitioner's pre-PDA policies could not have been unlawful under Title VII at the time based on *Gilbert* and a statement in the 1991 EEOC Compliance Manual. (Amicus Br. of U.S. at 12 n.2.) As discussed below, *see infra* at Section II.B.2, *Gilbert*'s narrow holding did not implicate the legality of the use of AT&T's NCS system for setting pension benefits. Moreover, the EEOC statement which the United States cites is a retrospective statement inconsistent with the EEOC's interpretation of Title VII that was operable during the relevant time period, and is likely based on its interpretation of subsequent case law. While courts should pay deference to EEOC interpretations of statutes and regulations under its purview, "[a]gencies have no special claim to deference in their interpretation of [the Supreme Court's] decisions." *Ledbetter*, 127 S. Ct. at 2177 n.11 (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000)). Regardless, to the extent that the current EEOC Compliance Manual provides guidance on this issue, it requires employers, when setting pension benefits, to treat calculations of days worked during pregnancy leave the same as all other medical leaves. EEOC Compliance Manual, ch. 3, Employee Benefits, Title VII/EPA Issues III B (Oct. 3, 2000).

2. *Gilbert* Was Limited to Policies Relating to Pay and Benefits *During* Pregnancy and Pregnancy Leave.

In *General Electric Co. v. Gilbert*, this Court held that the failure of an employer to provide disability benefits during pregnancy leave, while providing such benefits during other temporary leave, did not constitute sex discrimination under Title VII. 429 U.S. 125, 140-41 (1976). As discussed *infra*, Congress acted swiftly to reestablish the original purpose and understanding of Title VII by enacting the PDA a little more than a year later. Even before Congress acted, however, this Court made clear that *Gilbert* should be construed narrowly and applied only to policies relating to pay and benefits *during* pregnancy and pregnancy leave. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 141-43 (1977) (holding that differential treatment of pregnancy leave for purposes of calculating days worked, which affected employees' calculation of seniority, could not be analyzed in the same way as the health benefits in *Gilbert* because of the punitive and long-ranging impact of the policy on female employees).

In determining that General Electric's failure to extend health coverage to employees during pregnancy leave did not violate Title VII, the *Gilbert* majority refused to acknowledge that a policy that failed to cover disability benefits during the kind of leave that only women need to take violated Title VII. Rather than recognizing that disfavored treatment of pregnancy discriminates against women, the Court adopted the formalistic approach of *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974), in which the Court held that a state-operated disability income protection program

that excluded normal pregnancy did not violate the Equal Protection Clause of the Fourteenth Amendment because all male and female non-pregnant employees were treated alike. Similarly, in *Gilbert*, the Court framed the classification contained in General Electric's disability health benefits policy as between pregnant and non-pregnant persons rather than between men and women. 429 U.S. at 135. According to the Court, since only pregnant women would be adversely affected by the exclusion of pregnancy-related health benefits, and non-pregnant women would not, the classification was not sex-based. Second, the Court concluded that because pregnancy was "an *additional* risk, unique to women," and the policy did not destroy the "presumed parity of the benefits" between men and women, sex discrimination was not present. *Id.* at 139 (emphasis added).

The majority opinion prompted Justices Stevens and Brennan to issue two stinging dissents. Justice Stevens concluded that the plain language of Title VII prohibited General Electric's plan because it placed the risk of absence caused by pregnancy in a class by itself, and "by definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 161-62 (Stevens, J. dissenting). Justice Brennan sharply criticized the majority for failing to appreciate that General Electric's policies reflected stereotypes concerning the place that employment occupied in women's lives and the "broad social objectives" promoted by Title VII. *Id.* at 148-50 & n.1 (Brennan, J., dissenting). Justice Brennan found the EEOC's understanding that excluding

pregnancy from a disability insurance plan was "incompatible with the overall objectives of Title VII" to "represent a particularly conscientious and reasonable product of EEOC deliberations," thereby meriting great deference. *Id.* at 148, 157 (Brennan, J., dissenting). He stated that the majority's rejection of the EEOC guidelines was unjustified. *Id.* at 148 (Brennan, J., dissenting).

Shortly after its decision in *Gilbert*, this Court decided *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). The Court drew a distinction between employer policies that refuse to "extend to women a benefit that men cannot and do not receive," and those policies that impose "a substantive burden that men need not suffer." 434 U.S. at 142. It concluded that a policy that denied accumulated seniority to female employees returning to work following pregnancy leave imposed a substantial burden on women. *Id.* In holding that the policy violated Title VII, the Court emphasized that women, and only women, would suffer the effects of such a policy for the remainder of their careers. *Id.* at 141-42. The Court concluded that Title VII does not "permit an employer to burden

female employees in such a way as to deprive them of employment opportunities because of their different role [in the scheme of human existence]." *Id.* at 142 & n. 4.[4]

Consistent with *Satty*, after the Court's decision in *Gilbert* and before the PDA was enacted, federal courts of appeals continued to hold that a plaintiff could successfully challenge a policy that discriminated on the basis of pregnancy and found policies similar to AT&T's unlawful under Title VII. For example, the Third Circuit held that an employer's practice of denying female employees credited service and seniority for periods during which they were absent from work because of disabilities arising from pregnancy or childbirth constituted unlawful discrimination under Title VII because, *inter alia*, "[t]he Supreme Court in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), made it clear that *Gilbert* ought not to be read broadly as a bar to Title VII claims in situations and on subjects other than those arising in *Gilbert*." *Eberts v. Westinghouse Elec. Corp.*, 581 F.2d 357, 360-61 (3d Cir. 1978); *see also deLaurier v. San Diego Unified Sch. Dist.*, 588 F.2d 674 (9th Cir. 1978); *Love v. Waukesha Joint Sch. Dist.*,

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[4] The Court upheld a company policy that failed to extend sick-leave pay to employees disabled by pregnancy, finding it "legally indistinguishable" from the disability-insurance program upheld in *Gilbert*. 434 U.S. at 143.

560 F.2d 285, 288 (7th Cir. 1977); *Liss v. School Dist. of City of Ladue*, 548 F.2d 751, 752 (8th Cir. 1977).[5]

Although *Gilbert* changed the understanding of sex discrimination under Title VII in limited circumstances and for a brief period of time, it did not change the state of the law with respect to policies

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[5] Petitioner cites three cases to support the proposition that before the PDA took effect, its policy was lawful under Title VII. (Petr. Br. 17.) The first case, *Pallas v. Pacific Bell*, mentioned the law prior to *Gilbert* solely in dicta, disposing of it in one sentence. 940 F.2d 1324, 1327 (9th Cir. 1991). In *Ameritech Benefits Plan Committee v. Communication Workers of America*, the issue also was not central to the court's holding, and the court appeared to simply accept the employer's broad characterization of *Gilbert*, similar to Petitioner's erroneous characterization here, without even acknowledging *Satty*. 220 F.3d 814, 823 (7th Cir. 2000). The third case, *In re Southwestern Bell Tel. Co. Maternity Benefits Litigation*, upheld Southwestern Bell's policy, similar to AT&T's policy at issue here, which failed to credit days worked during pregnancy leave like all other types of disability leave. The court held that while the policy at issue in *Satty*, which divested employees of accumulated seniority, constituted a burden "depriv[ing] [women] of employment opportunities because of their different role," the same could not be said for Southwestern Bell's policy. 602 F.2d 845, 848-49 (8th Cir. 1979). That holding, however, failed to meaningfully appreciate the benefit/burden dichotomy established by *Gilbert* and *Satty*. Southwestern Bell's policy clearly imposed a substantial burden under *Satty* because it had the potential to punish only those employees who took pregnancy leave for decades to come since various employee benefits were based on such seniority. *See Eberts*, 581 F.2d at 361 (noting that claims concerning employer's denial of "credited service" for absenteeism from pregnancy or childbirth disability fall within the "substantial burden" category under *Satty*). To frame such a policy as merely the withholding of a benefit, rather than the imposition of a burden, as Petitioner attempts to do, is to mischaracterize it to the point of trivializing the inequity it perpetuates. (Petr. Br. 22.)

like AT&T's. This Court's decision in *Satty* and the decisions of the appellate courts following it made clear that *Gilbert*'s narrow holding was limited to policies relating to pay and benefits during pregnancy and pregnancy leave.[6] Plans that treated pregnancy leave unfavorably for calculation of days worked continued to violate Title VII.[7]

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[6] In *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994), this Court made clear that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Although *Gilbert*'s holding may serve as an authoritative statement of what Title VII meant as it was applied to the type of benefit policy at issue in that case, the Court's holding in *Satty* makes clear that *Gilbert* did not serve as the authoritative statement on policies of the type at issue here.

[7] This is consistent with the approach taken by the European Union ("EU"). Under EU law, disfavored treatment of a woman related to the calculation of days worked during pregnancy or maternity leave constitutes direct discrimination. *See* Directive of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation Council Directive 2006/54/EC, 2006 O.J. (L 204/23) (EU) (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)), art. 2(2)(c); ¶ 23, Case C-177/88 *Dekker v. Stichting* [1990] ECR, I-3941, para. 12; Case C-32/93 *Webb v. EMO Air Cargo* [1994] ECR, I-3567, para. 19. *See* Case C-411/96 *Boyle v. Equal Opportunities Comm'n* [1998] ECR, I-6401 (employment contracts cannot limit the ability of women to accrue pension rights during the period of maternity leave); Case C-342/93 *Gillespie v. No. Health & Soc. Servs. Bds.* [1996] ECR, I-475 ("reference pay" used to calculate maternity benefits must take into account any pay raise accrued between the date used to calculate reference pay and the end of maternity leave).

3. As This Court Has Recognized, Congress Enacted the PDA To Make Clear That the Uniform Understanding of the Six Federal Courts of Appeals to Have Addressed Pregnancy Discrimination Before *Gilbert* Was Correct.

To the extent that the *Gilbert* majority's erroneous interpretation of the meaning of sex discrimination under Title VII created uncertainty about whether all, or some, policies that disfavored pregnancy constituted sex-discrimination, the decision was not permitted to stand for very long. As this Court has recognized, Congress swiftly passed the PDA to repudiate the *Gilbert* majority and to make clear that any disfavored treatment of pregnancy for any aspect of employment constitutes sex discrimination under Title VII on its face, as it was previously understood before *Gilbert*.

The PDA not only overturned *Gilbert*, but also rejected the interpretive rationale applied by the Court and affirmed the dissents' interpretation of the statute. *See, e.g., Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 n. 6 (1987); S. Rep. 95-331, at 2 (1977) (Conf. Rep.); H.R. Rep. 95-948, at 2 (1978) (Conf. Rep.) ("It is the Committee's view that the dissenting justices [in *Gilbert*] correctly interpreted the Act."). Congress intended to reestablish Title VII as the robust guarantee of *substantive* equality that it was always intended to be by rejecting the major premise of *Gilbert*: that pregnancy classifications

were gender neutral, rather than sex-based. *See* Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 936 (1985). As the House Report describes, the PDA "[made] clear that distinctions based on pregnancy are *per se* violations of Title VII [and] the bill would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions created in *Satty*." H.R. Rep. No. 95-948, at 3. Congress therefore made clear what federal appellate courts had already uniformly recognized—that discrimination against pregnancy *is* discrimination against women.

That Congress sought to reinstate the original intent and understanding of Title VII through the PDA is abundantly clear from its legislative history. *See* H.R. Rep. 95-948, at 3, 8 (stating that the PDA was "reestablishing the law as it was understood prior to *Gilbert*" and that the PDA "will reflect *no new legislative mandate* of the Congress nor effect changes in practices, costs, or benefits beyond those intended by Title VII") (emphasis added). Senator Javits, who co-sponsored the bill, explained:

> This legislation does not represent a new initiative in employment discrimination law, neither does it attempt to expand the reach of title VII of the Civil Rights Act of 1964 into new areas of employment relationships. Rather, this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the

> point where it was last year, before the Supreme Court's decision in [*Gilbert*].

123 Cong. Rec. 29387 (1977).[8]

This Court has expressly and repeatedly recognized as much. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, it acknowledged Congress's view that the "Court had erroneously interpreted [the] Congressional intent [of Title VII] and . . . amending legislation was necessary to *reestablish* the principles of Title VII law as they had been understood prior to the *Gilbert* decision." 462 U.S. 669, 679 (1983) (emphasis added) (citing 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins); *see also Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 277 (remarking that the PDA "specifie[d] that sex discrimination *includes*

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[8] It is clear that Congress also believed that *Gilbert* was confined to policies concerning benefits during pregnancy leave. Congress included a 180-day compliance provision in the PDA only for the provision of the Act that related directly to the *Gilbert* holding—policies pertaining to fringe benefits. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, § 2(b). In describing why a 180-day compliance period was necessary for fringe benefit policy compliance, but not for any other type of policy, the House Report stated, "[a]s the *Gilbert* decision permits employers to exclude pregnancy-related coverage from employee benefit plans, H.R. 6075 provides for transition period of 180 days to allow employees to comply with the explicit provisions of the Amendment." H.R. Rep. No. 95-948, at 8. Congress explained why all other employment policies and practices relating to pregnancy had to be brought into compliance with the Act immediately upon its passage: "Section 2(a) provides for an immediate effective date insofar as the bill affects employment policies other than fringe benefits, including . . . denying seniority . . . . Many, if not all such policies, are presumably invalid under present law as interpreted in *Satty*." *Id.*

discrimination on the basis of pregnancy") (emphasis added); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1086 n.14 (1983) ("[T]he purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles . . . . ") (Marshall, J., concurring, joined in relevant part by Brennan, White, Stevens, and O'Connor, JJ.); *accord Hall v. Nalco Co.*, 534 F.3d 644, 647 (7th Cir. 2008); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003); *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005 (7th Cir. 2001); *Lang v. Star Herald*, 107 F.3d 1308, 1311 n.2 (8th Cir. 1997); *Fleming v. Ayers & Assoc.*, 948 F.2d 993, 997 (6th Cir. 1991); *Harness v. Hartz Mountain Corp.*, 877 F.2d 1307, 1309 (6th Cir. 1989); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987); *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243, 1245-46 (9th Cir. 1982).

4. Under This Court's Precedents, AT&T's Policy Was Always Unlawful Because It Undermines Substantive Equality in the Workplace.

Both before and after *Gilbert*, as well as both before and after the PDA was enacted, the use of term-of-employment calculations that treated pregnancy leave less favorably than other medical leave to set pension benefits was unlawful under this Court's decisions interpreting Title VII.

When Congress enacted the PDA, it did so to reestablish the understanding that Title VII requires more than formalistic equality between two groups. It agreed with and vindicated Justice Brennan's

observation in *Gilbert* that "discrimination is a social phenomenon encased in a social context and, therefore, unavoidably takes its meaning from the *desired end products* of the relevant legislative enactment, end products that may demand due consideration to the uniqueness of the 'disadvantaged' individuals." *Gilbert*, 429 U.S. at 159 (Brennan, J., dissenting) (emphasis added); *see also Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 393 (9th Cir. 1985) (explaining that one cannot measure the "equality of benefits by the sameness of coverage despite differences in need"), *aff'd*, 479 U.S. 272 (1987).

Ensuring substantive equality means ensuring the "equal opportunity to aspire, achieve, participate in and contribute to society based on . . . individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). Accordingly, as this Court has consistently recognized, policies that reflect or reinforce gender stereotypes are inconsistent with Title VII's goals of substantive equality in the workplace. Policies that count disability leave taken towards time earned in calculating pension benefits, but do not count pregnancy-related leave towards such calculations, reinforce the stereotypical notion that mothers are not workers. Thus, such policies are prohibited under Title VII, irrespective of the PDA. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that Title VII prohibits the use of sex stereotyping in evaluating plaintiff's candidacy for partnership position, explaining that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"), *superseded*

by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992); *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 290; *Manhart*, 435 U.S. at 709 (stating, when discussing sex discrimination under Title VII, that "[p]ractices that classify employees in terms of religion, race or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals"); *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (holding that "it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes"); *Gilbert*, 429 U.S. at 150 n.1 (Brennan, J., dissenting); *Phillips*, 400 U.S. 542 (holding that a policy prohibiting employment of women, but not of men, with pre-school-age children discriminates on the basis of sex in violation of section 703(a) of Title VII, and remanding for further proceedings about whether the employer could establish a BFOQ defense for the policy under 703(e)); *see also Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003) (discussing the need for the Family Medical Leave Act, like Title VII, to address "mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities").

This Court's decision in *Newport News* is emblematic of this Court's approach to Title VII generally—and, specifically, this Court's understanding of the role of the PDA as merely reestablishing the intended meaning and scope of Title VII. In *Newport News*, male employees challenged a company policy that provided less favorable health coverage for pregnancy-related conditions than for other health conditions for employee spouses. 462 U.S. at 670. Because men cannot get pregnant, under a literal approach to this issue, myopically focused on the text of the PDA, a failure to provide pregnancy benefits could not constitute sex discrimination against *men*. The Court recognized, however, that in order to decide whether the policy discriminated against men because of *their* sex, it had to look "beyond the bare statutory language" of the PDA and to the understanding of Title VII as a whole. *Id.* at 676 & n.11 ("Although the [PDA] makes clear that this language should be construed to prohibit discrimination against a female employee on the basis of her own pregnancy, *it did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee-male or female-which was already present in the Act.*") (emphasis added); *see also Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (holding that policy that requires only female employees to produce proof that they are not capable of reproducing as a

prerequisite for certain jobs is facially discriminatory under Title VII, as "bolstered by the PDA").[9]

California Federal Savings and Loan Association v. Guerra further illustrates the point. The plaintiffs in that case challenged a California law that required employers to provide four months of physical disability leave on account of pregnancy. 479 U.S. at 275-76. They sought a declaration that California's law requiring "preferential" treatment of pregnancy was inconsistent with and preempted by the language of the PDA that required pregnant women to be "treated the same" as other persons equal in their

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[9] That the PDA simply made express Congress's intent to treat pregnancy consistent with general Title VII principles, rather than creating an additional form of discrimination not previously covered, is further illustrated by the following hypothetical scenario. Suppose a company provided pension service credit for sick leave taken for all illnesses and temporary disabilities, except those arising from prostate cancer. Under a proper Title VII analysis, that policy would constitute unlawful discrimination against men. That approach would require a court to look at whether there is equality in results for men and women concerning the comprehensiveness of the service credit system, instead of whether the policy "equally" or "to the same extent" denies prostate cancer coverage to both men and women. *See Gilbert*, 429 U.S. at 153 n.5 (Brennan, J., dissenting). It would be absurd to suggest, as Petitioner's argument essentially does, that such a policy would not constitute sex discrimination against males because no "prostate cancer amendment" to Title VII has been enacted.

inability to work. *Id.* at 279.[10] This Court rejected the notion that the PDA substantively altered Title VII or constrained a state's ability to take measures to achieve substantive equality for women. *Id.* at 284-85.[11]

In its rulings in *Newport News* and *California Federal Savings*, this Court relied on a contextual understanding of sex discrimination instead of assessing the policy at issue under a formal equality framework. It explained that in determining whether sex discrimination exists, one should look at the goal to be achieved—equality in the workplace—rather than the sameness in policies. *Cal. Fed.*, 479 U.S. at 277. In *Newport News*, for example, the Court recognized that in determining whether discrimination was present, its focus should not be on the universal need for the specific benefits at issue. *See* 462 U.S. at 684 ("Under the proper test petitioner's plan is unlawful, because the protection it affords to married male employees is less comprehensive than the protection it affords to

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[10] The second clause of the PDA provides that "women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k) (emphasis added).

[11] The Court explained that the purpose of the PDA was to reflect Congress's disapproval of the reasoning in *Gilbert*. The Act's language did not impose a limitation on how sex discrimination with respect to pregnancy could be remedied, but rather was illustrative of a means to do so. *Cal. Fed.*, 479 U.S. at 284-85; *see also Newport News*, 462 U.S. at 679 n.14.

married female employees.").[12] Similarly, in concluding that California's law was not preempted in *California Federal Savings*, the Court thoughtfully discussed how "[a] realistic understanding of conditions found in today's labor environment warrants taking pregnancy into account in fashioning disability policies." *Cal. Fed.*, 479 U.S. at 289 (quoting Justice Brennan's explanation of the proper

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[12] Accordingly, if a court employs the traditional "similarly situated" test when inquiring whether sex discrimination has occurred under Title VII, it must look at whether the parties are similarly situated in terms of their position and the desired end products sought to be achieved –such as comprehensive health care coverage—rather than whether they are similarly situated with respect to the need for coverage of a particular medical condition. *See* Siegel, 94 YALE L.J. at 953-55 (cited with approval in *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 285 n.16); Cornelia Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 964 (2007) (explaining that under a strictly formal equality framework, "insofar as women and men are not similarly situated with respect to pregnancy, they need not be treated equally").

interpretation of Title VII as originally enacted in his *Gilbert* dissent, 429 U.S. at 159).[13]

CONCLUSION

For the reasons stated above and in Respondents' brief, this Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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[13] A substantive equality approach is also reflected in the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), which has been ratified by 185 nations and was signed by the United States in 1980. The Committee on the Elimination of Discrimination, the body of independent human rights experts that monitors implementation of CEDAW, has stated that "[i]t is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account" and "[u]nder certain circumstances, non-identical treatment of women and men will be required in order to address such differences." Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25: (Art. 4), Paragraph 1, of the Convention, (temporary special measures)*, 30th Sess., ¶ 8, U.N. Doc. A/59/38 (2004).

AMICUS CURIAE BRIEF

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No. 07-543

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IN THE

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AT&T CORPORATION,
Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET;
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COMMUNICATIONS WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief urges reversal of the decision below and thus supports the position of Petitioner AT&T Corporation before this Court.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or their counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), and the other various statutes, federal orders, and regulations pertaining to nondiscriminatory employment practices. Most of EEAC's members have programs or policies whose eligibility requirements depend upon the length of service of employees. Also, many members have voluntary or collectively-bargained seniority systems where length-of-service requirements determine benefit eligibility or the relative benefit and employment status among covered employees under the system.

Thus, EEAC members have a direct interest in the issues presented for the Court's consideration in this case. The *en banc* Ninth Circuit held that AT&T violated Title VII when it calculated the individual respondents' retirement benefits based on accrued net credited service which did not include full credit for pregnancy leave taken prior to passage of the

Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k). The court below rejected AT&T's argument that the company's policy of awarding only partial service credit for pregnancy leave was legal when it occurred and had no present legal consequences when respondents sought to retire. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

EEAC's members are concerned that the Ninth Circuit's opinion departs from settled law and threatens to cause significant confusion. Employers with length-of-service requirements will face great uncertainty when computing benefit eligibility, because they cannot accurately predict when events that occurred in the distant past will resurface as the basis for challenging their benefit determinations. In addition, the rights of other employees whose own eligibility will be affected by service computations will be disrupted if the decision is allowed to stand. Indeed, major unforeseen demands on pension funds could have a potentially disruptive impact on available retirement funds.

Because of this interest, EEAC participated as *amicus curiae* in several of the cases that will be considered in this case. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Bazemore v. Friday*, 478 U.S. 385 (1986); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), *superseded on other grounds*, 42 U.S.C. § 2000e-5(e)(2); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). EEAC also has filed briefs in a number of other relevant cases involving the interpretation of Title VII's timely filing requirements under Section 706(e), 42 U.S.C.

§ 2000e-5(e).[2] Moreover, EEAC has briefed numerous cases involving an analysis of the special protections that § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides to bona fide seniority systems.[3]

EEAC seeks to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

AT&T[4] uses a "net credited service" (NCS) seniority system to determine each employee's eligibility for a retirement pension and the amount of that pension, as well as other benefits. Pet. App. 66a. An employee's first day of employment becomes his or her initial NCS date. *Id.* During employment, the NCS date is adjusted forward based on actual time worked. *Id.*

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[2] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980); *EEOC v. Commercial Office Prods. Co*, 486 U.S. 107 (1988).

[3] *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

[4] AT&T is the successor in interest to Pacific Telephone & Telegraph (PT&T), Respondents' original employer.

Before August 7, 1977, AT&T lawfully classified pregnancy leave as a "personal" leave of absence. *Id.* Employees who took personal leave of absence received NCS credit for only the first thirty days of leave, regardless of the actual length of the leave period. *Id.* Employees on paid temporary disability leave, in contrast, received full service credit for the entire time they were out of work. *Id.* at 66a-67a. Thus, pregnancy leave, but not disability leave, was subject to the 30-day service credit cap. *Id.* at 67a.

On August 7, 1977, AT&T began crediting women who took pregnancy leave with up to thirty days of service credit for leave taken before delivery and up to six weeks for leave taken after delivery. *Id.* When the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), took effect on April 29, 1979, AT&T began giving employees full service credit for pregnancy leave, just as it did for disability leave. *Id.* The company did not, however, retroactively adjust NCS dates to grant service credit for pregnancy leave taken prior to the effective date of the PDA. *Id.*

Respondents are four former or current employees of AT&T and their union, the Communications Workers of America, AFL-CIO (CWA). *Id.* at 66a. The individual respondents took pregnancy leaves of absence prior to passage of the PDA, and thus received less than full service credit for that time. *Id.* Accordingly, their retirement benefits are somewhat less than they would have been had AT&T granted them full service credit for their pregnancy leave. *Id.* at 68a-69a. Respondents sued AT&T under Title VII, contending that the company discriminated against them on the basis of sex when calculating their retirement benefits by not retroactively granting

them service credit for the full duration of their pregnancy leave. *Id.* at 69a.

The parties stipulated to the facts and filed cross-motions for summary judgment. *Id.*; Pet. App. 105a. The district court concluded that it was bound by the Ninth Circuit's decision in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), which invalidated the same NCS calculation system at issue in this case, and granted plaintiffs' motion for summary judgment. *Id.* at 106a. A three-judge panel of the Ninth Circuit reversed, holding that to the extent *Pallas* gave the PDA retroactive effect, it no longer is controlling in light of this Court's subsequent decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which held that absent express congressional intent to do so, a statute should not be read to apply retroactively. Pet. App. 64a-85a.

On rehearing, a divided Ninth Circuit *en banc* panel expressly reaffirmed *Pallas*, holding again that AT&T's failure to retroactively grant service credit for pre-PDA pregnancy leave in calculating the individual respondents' retirement benefits violates Title VII. Pet. App. 1a-63a. The majority explicitly disagreed with decisions of the Sixth and Seventh Circuits to the contrary. Pet. App. 27a n.11 (rejecting *Ameritech Benefit Plan Comm. v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), and *Leffman v. Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007)). Judge O'Scannlain, joined by three others, dissented, concluding that "*Pallas* invented a timely Title VII violation where the determination of benefits simply gave present effect to past, unchallenged acts, contrary to Supreme Court authority. . . ." Pet. App. 63a, and that "*Pallas* was wrong then and is wrong now." Pet. App. 29a.

AT&T filed a petition for certiorari with this Court on October 22, 2007, which was granted on June 23, 2008.

SUMMARY OF ARGUMENT

Employment actions long past are not actionable. This Court in *United Air Lines v. Evans* ruled that an alleged discriminatory act that has not been made the subject of a timely charge "is the legal equivalent of a discriminatory act which occurred before the statute was passed," or in other words, "merely an unfortunate event in history which has *no present legal consequences*." 431 U.S. 553, 558 (1977) (emphasis added). Since *Evans*, the Court has applied this rule consistently, in *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980) ("[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination"); in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989) ("a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations" is not actionable), *superseded on other grounds*, 42 U.S.C. § 2000e-5(e)(2); in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) ("discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges"); and most recently in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2172 (2007) ("[w]e therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period"). Thus, even a challenge

to a discriminatory act is time-barred absent a timely charge of discrimination.

Here, the AT&T policy being challenged was not even unlawful, absent retroactive application of the Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k). And the PDA is not retroactive. *Landgraf*, 511 U.S. at 257 n.10. Indeed, AT&T's calculation of respondents' retirement benefits is simply the application of a facially neutral seniority system, which is immune to challenge under Title VII. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 352-53 (1977).

A decision requiring retroactive awarding of service credit would disrupt existing pension plan funds and jeopardize the benefits available to employees and former employees covered by these plans. "Retroactive liability could be devastating for a pension fund" and, just as importantly, the "harm would fall in large part on innocent third parties." *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (footnote omitted).

Furthermore, because the use of length-of-service requirements is a staple of corporate employee benefit policies, a retroactivity requirement would severely upset other programs as well, such as those involving eligibility for promotions, severance pay, holidays, sick leave, group life and hospitalization insurance and health and welfare plans, selection for layoffs and priority for rehiring, shift preference, distribution of overtime work, transfers, vacation privileges, and selection of days off.

Moreover, a decision requiring employers to grant service credit for leave taken many years ago also would impose upon employers the burden of de-

fending against long stale claims, a result this Court has rejected repeatedly. *Ledbetter*, 127 S. Ct. at 2170-71 (citations omitted).

ARGUMENT

I. NEITHER PASSAGE OF THE PREGNANCY DISCRIMINATION ACT NOR SUBSEQUENT APPLICATION OF A NEUTRAL SENIORITY SYSTEM CAN RENDER UNLAWFUL SERVICE CREDIT DETERMINATIONS THAT WERE LAWFUL WHEN MADE

A. Under This Court's Decisions From *United Air Lines v. Evans* To *Ledbetter v. Goodyear*, Lingering Consequences Of Past Acts Have No Legal Effect

The Ninth Circuit below held that AT&T violated Title VII in 1994, and in various years thereafter with respect to the other individual respondents, by not crediting Respondents with service credit for pregnancy leave taken between 1966 and 1976. Because denial of such credit was permissible when the leave was taken, however, AT&T did not discriminate by applying its neutral seniority system to determine the proper amount of pension benefits for each Respondent. Accordingly, EEAC respectfully submits that this Court should reverse the decision below and adopt the reasoning of the Sixth and Seventh Circuits in *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000), and *Leffman v. Sprint Corp.*, 481 F.3d 428 (6th Cir. 2007).

As did *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007), this case "calls upon

[the Court] to apply established precedent in a slightly different context." This Court consistently has held that the lingering consequences of past acts, even past discriminatory acts, have no present legal effect and thus are not actionable. *United Air Lines v. Evans*, 431 U.S. 553 (1977), involved a situation strikingly similar to the instant case. The plaintiff there worked as a flight attendant from 1966 to 1968. When she married in 1968, she was required to resign under United's policy of refusing to allow its female flight attendants to be married. In 1972, United rehired Evans as a new employee. She was not given any seniority credit for her prior service, and "for seniority purposes, she [was] treated as though she had no prior service with United." 431 U.S. at 555 (footnote omitted).

Evans claimed that United was guilty of a present violation of Title VII because it did not give her credit after her rehire for service prior to her forced resignation in 1968. The Court explained that assuming her 1968 separation violated Title VII, "the question now presented is whether the employer is committing a second violation of Title VII by refusing to credit her with seniority for any period prior to February 1972 [when she was rehired]." *Id.* at 554. As the district court there noted, Evans was "seeking to have this court merely reinstate her November, 1966 seniority date which was lost solely by reason of her February, 1968 resignation." *Id.* at 556 n.8.

This Court held that Evans had failed to file a timely charge of discrimination. 431 U.S. at 558 ("United Air Lines was entitled to treat that past act *as lawful* after respondent failed to file a [timely] charge") (emphasis added). The Court also rejected Evans' claim that her employer's failure to credit her

with past seniority could be considered a "present *violation*." *Id.* (emphasis added). An alleged discriminatory act that has not been made the subject of a timely charge, the Court held, "is the legal equivalent of a discriminatory act which occurred before the statute was passed." *Id.* Thus, the act was "merely an unfortunate event in history which has *no present legal consequences*." *Id.* (emphasis added).

Subsequent decisions of this Court have followed this principle. In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), this Court declined to allow an employee to challenge his denial of tenure at the time his employment was to be terminated—after the limitations period for filing a charge had expired—even though he did not feel the effects of the decision until his termination. Applying *Evans*, this Court explained that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* at 257 (citation omitted). It found that "[the] proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added in *Ricks*).

Similarly, in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), *superseded on other grounds*, 42 U.S.C. § 2000e-5(e)(2), this Court concluded that "[l]ike Evans, petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing

violation." *Id.* at 908.[5] Relying again on *Evans* and *Ricks*, the Court restated this principle in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), concluding that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."

This Court recently reaffirmed *Evans, Ricks, Lorance*, and *Morgan* in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). Ledbetter sought to challenge pay decisions made throughout her nearly twenty-year career on the theory that the sum total led to her being paid substantially less than her male colleagues. Quoting the "no present legal consequences" statement from *Evans*, this Court said that "[i]t would be difficult to speak to the point more directly." *Id.* at 2168. Accordingly, this Court concluded in *Ledbetter* that "[w]e therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period." 127 S. Ct. at 2172.

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[5] Indeed, even the dissenting opinion in *Lorance* cited the *Evans* decision as applying where there is no allegation that the seniority system itself is discriminatory. 490 U.S. at 917. In the instant case, there can be no valid claim that the seniority system was adopted with a discriminatory intent.

Also, section 112 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e) (amended), does not affect the viability of this part of the *Lorance* decision, as section 112 merely deals with the timeliness of a charge alleging that a "seniority system was adopted with an intentionally discriminatory purpose." *Evans, Ricks,* and the reasoning of the *Lorance* decision remain in place. *Ledbetter*, 127 S. Ct. at 2169 n.2.

Importantly, this Court in *Ledbetter* distinguished its decision in *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam), rejecting the contention that *Bazemore* compels a different approach in compensation cases. *Bazemore* involved a facially discriminatory pay system that predated Title VII but continued after Title VII was passed. As the Court explained in *Ledbetter*, the employer in *Bazemore* committed a present violation of Title VII by paying employees of one race less than employees of another. *Bazemore* does not "stand[] for the proposition that an action not comprising an employment practice and alleged discriminatory intent is separately chargeable, just because it is related to some past act of discrimination." *Ledbetter*, 127 S. Ct. at 2174. On the contrary, "Title VII imposed 'no obligation to catch-up,' *i.e.*, affirmatively to remedy present effects of pre-Act discrimination, whether in composing a work force or otherwise." *Id.* at 2174 n.5 (quotations in original). Indeed, the *Bazemore* Court was careful to note, consistent with *Evans*, that it was "in no sense giv[ing] legal effect to pre-[Act] actions," or acts otherwise not actionable, but instead was "focuse[d] on the present salary structure." 478 U.S. at 396 n.6.

This Court consistently has held that past acts, even discriminatory ones, have "no present legal consequences." AT&T's policy before 1978 to grant less service credit for pregnancy leave than for disability leave—even if it were unlawful at the time—thus has no legal effect today.

B. Because The Pregnancy Discrimination Act Is Not Retroactive, A Policy That Awarded Only Partial Service Credit For Pregnancy Leave Prior To Its Effective Date Cannot Violate Title VII

As noted above, past acts, even unlawful ones, are not actionable once the limitations period has ended. In the instant case, the company policy in question, which afforded only partial service credit for pregnancy leave, was not even unlawful at the time it was applied.

In *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976), this Court ruled that exclusion of pregnancy from a disability benefits plan was "not gender-based discrimination at all." It was not until Congress passed the Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k), which amended Title VII's definition of sex discrimination to include discrimination on the basis of "pregnancy, childbirth or related medical conditions," 42 U.S.C. § 2000e(k), and added nondiscrimination against "women affected by pregnancy" as to the "receipt of benefits under fringe benefit programs," that such a policy became unlawful. *Id.* When the PDA took effect on April 29, 1979, AT&T promptly changed its policy to comply with the requirements of the new law.

Thus, even if the current consequences of AT&T's policy were somehow actionable, which they are not under *Evans, Ricks, Lorance, Morgan,* and *Ledbetter*, the policy could not constitute unlawful discrimination under the PDA. There is a general presumption against the retroactive application of statutes, and "prospectivity remains the appropriate default rule" unless Congress has clearly indicated

that a statute is to have retroactive application. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994).

The PDA was intended to be prospective only and not to apply to events occurring prior to its enactment. As this Court has stated, "[t]he [PDA] amendment to Title VII became effective on the date of its enactment, October 31, 1978, but its requirements did not apply to any then-existing fringe benefits program until 180 days after enactment—April 29, 1979." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 671 n.2 (1983) (citation omitted). This language is a clear indication from Congress that the PDA was not intended to be retroactive. *Landgraf*, 511 U.S. at 257 n.10.

The Ninth Circuit was simply wrong in concluding that pregnancy discrimination was always prohibited by Title VII and that *Gilbert* was simply a temporary aberration. Pet. App. 11a-12a n.6. Under the doctrine of separation of powers, while the Congress makes the laws, it is the judiciary's exclusive authority to interpret them. "It is this Court's responsibility to say what a statute means . . . . A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (footnote omitted). Congress cannot "legislatively overrule" a court decision; at most, it can amend the underlying statute. It may, subject to constitutional constraints, make the amendment retroactive, in an attempt to reach conduct prior to the amendment. But as this Court has pointed out, "[e]ven when Congress intends to supersede a rule of law embodied in one of our

decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the 'corrective' amendment must clearly appear." *Id.* at 313.

Accordingly, AT&T's leave policy when it was applied was not unlawful when it took effect, and subsequent legislation did not make those past practices unlawful. This Court held in *Evans* and its progeny that a Title VII violation could not be premised on the current effects of past discrimination. There is an even stronger argument in the instant case to apply the same rule when the act complained of was not even unlawful at the time.

C. Application Of A Facially Neutral Seniority System Based In Part On Lawful Service Credit Awards Thus Does Not Violate Title VII

When it calculated Respondents' retirement benefits, AT&T simply applied a facially neutral seniority system based on service credit awards that were lawful when made. Even if the policy granting only partial service credit for pregnancy leave had been unlawful at the time, the notion that present application of a seniority system on that basis constitutes a current Title VII violation was rejected by this Court three decades ago. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

In Title VII, Congress "afforded special treatment" to seniority systems. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). Section 703(h) provides in pertinent part that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

pursuant to a bona fide seniority or merit system . . . , provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(h). In so doing, Congress made explicit that it did not intend to "destroy or water down the vested seniority rights of employees" under neutral seniority systems. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353 (1977). As the Court stated in *Teamsters*:

> [O]ur reading of the legislative history [of Title VII] compels us to reject the Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be 'bona fide.' *To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted.* It would place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority. The consequence would be a perversion of the congressional purpose.

Id. (emphasis added). As the Court went on to explain, even a length-of-service requirement that perpetuates the effects of pre-Act discrimination will not violate Title VII:

> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of

> employees simply because their employer had engaged in discrimination prior to the passage of the Act.

Id. at 352-53.

Although Title VII does not define the term "seniority system," this Court has held that the term should be defined broadly:

> In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that, alone or in tandem with non-"seniority" criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase. . . . [T]he principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

California Brewers Ass'n v. Bryant, 444 U.S. 598, 605-06 (1980) (footnotes omitted). Thus, the length-of-service feature "promotes stability and certainty among employees, furnishing a predictable method by which to measure future employment position." 444 U.S. at 614 (Marshall, J., dissenting).

At the time it calculated respondents' retirement benefits, AT&T merely applied a numerical calculation to the amount of service credit accrued by each person, based on net credited service. The calculation was no different for respondents than it was for every other employee.

For this reason, the 1991 amendment to Title VII addressing the *Lorance* decision does not apply to the instant case. That amendment provides that in the case of "a seniority system that has been adopted for

an intentionally discriminatory purpose," an action is still viable "when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U.S.C. § 2000e-5(e)(2). As this Court made clear in *Teamsters*, application of a seniority system that may give present effect to past discrimination does not constitute a current violation of Title VII.

Accordingly, this Court need only apply its existing precedent to conclude that AT&T's actions did not violate Title VII and thus reverse the Ninth Circuit's decision in this case.

II. ALLOWING CHALLENGES TO LONG-STANDING SERVICE CREDIT POLICIES WOULD DISRUPT THE ADMINISTRATION OF SENIORITY AND LENGTH OF SERVICE SYSTEMS, CAUSING CONFLICT WITH TITLE VII'S "SPECIAL TREATMENT" OF SUCH SYSTEMS AND JEOPARDIZING THE SENIORITY AND PENSION RIGHTS OF BENEFICIARIES OF EMPLOYEE BENEFIT PLANS

As sponsors of benefit plans, EEAC's members are concerned that a decision requiring retroactive awarding of service credit would disrupt existing plan funds and jeopardize the benefits available to employees and former employees covered by these plans. As this Court has explained:

> These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's [or employer's] likely liability. Risks that the insurer foresees will be included in the

> calculation of liability, and the rates or contributions charged will reflect that calculation. *The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits.* Drastic changes in the legal rules governing pension and insurance benefits, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 721 (1978) (footnote omitted) (emphasis added).[6] Thus, "[r]etroactive liability could be devastating to a pension fund" and, just as importantly, the "harm would fall in large part on innocent third parties." *Id.* at 722-23. The significance of this point cannot be overstated. As Justice Stevens observed in *Manhart*, "[f]ifty million Americans participate in retirement plans other than Social Security." 435 U.S. at 721.

The impact is not limited to retirement benefits. The use of length-of-service requirements in corporate employee benefit policies is widespread. Seniority often affects eligibility for promotions, severance pay, holidays, sick leave, group life and hospitalization insurance and health and welfare plans, selection for layoffs and priority for rehiring, shift preference, distribution of overtime work, transfers, vacation privileges, and selection of days off.

As a representative of a large and diverse group of major employers who use and administer such

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[6] *Accord Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1105-06 (1983); *Florida v. Long*, 487 U.S. 223, 235-36 (1988).

systems on a daily basis, EEAC urges this Court to consider the disruptive impact that the decision below could have on the whole range of employer programs based upon length-of-service and seniority requirements. If permitted to stand, the decision below will have the insupportable effect of compelling employers to anticipate recalculating numerous employee benefit and seniority rights in anticipation of unforeseen, outdated or time-barred claims for additional service credits based upon legal, pre-Act employment policies.

III. REQUIRING RETROACTIVE GRANTING OF SERVICE CREDIT TO REVERSE THE EFFECT OF LONG-EXTINCT LAWFUL POLICIES WOULD IMPOSE AN UNDUE BURDEN ON EMPLOYERS TO DEFEND AGAINST STALE CLAIMS

A decision requiring employers to grant service credit for leave taken many years ago also would impose upon employers the burden of defending against long stale claims, a result this Court has rejected repeatedly. Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). One such prerequisite is that aggrieved individuals must file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within one hundred and eighty days after the alleged discriminatory event occurred. 42 U.S.C. § 2000e-

5(e).[7] Title VII makes only one exception to this requirement. Where the aggrieved individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. 42 U.S.C. § 2000e-5(e). No other exceptions extend the length of Title VII's limitations period.

Congress mandated that the time limitations would start with the date of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 259 (1980) (internal quotation omitted). In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), this Court clarified that a Title VII plaintiff who challenges a "discrete" discriminatory act (such as discipline, discharge, promotion, transfer, and hiring), first must file an EEOC charge within 180 or 300 days of when the act "occurred"—or, as *Morgan* instructs, the day that it "happened."[8] *Id.* at 110, 113.

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[7] The second prerequisite is that an individual must file suit within ninety days of receiving a notice of the right to sue from the EEOC. 42 U.S.C. § 2000e-5(f).

[8] *Morgan* distinguished hostile work environment claims from claims involving "discrete" acts, explaining that a hostile work environment generally involves repeated conduct that occurs over a period of time—perhaps even years. *Morgan* at 115. While a single act may not be sufficient to support a claim of hostile environment discrimination under Title VII, the Court said, the cumulative total may. *Id.* Therefore, this Court interpreted Title VII as giving individuals 180 or 300 days from *any* act that forms part of the hostile environment claim to file an EEOC charge of harassment. *Id.* at 117-18.

Moreover, over the years this Court repeatedly has refused to sanction arguments in favor of lengthening the limitations period for discrete acts in certain cases beyond 180/300 days. Most recently, this Court recognized in *Ledbetter* that "we have repeatedly rejected suggestions that we extend or truncate Congress' deadlines." 127 S. Ct. at 2170. It observed:

> Statutes of limitations serve a policy of repose. They "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" The EEOC filing deadline "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." Certainly, the 180-day EEOC charging deadline is short by any measure, but "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.

127 S. Ct. at 2170-71 (citations omitted).

Even earlier, in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), the Court found that in choosing the length of Title VII's limitations period, Congress intentionally risked leaving some victims of discrimination without a remedy in order to further its goal of precluding stale claims. It stated:

> [I]t seems clear that the [limitations] provision to some must have represented a judgment that

> most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination.

447 U.S. at 820. It therefore concluded, "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 826.

Yet if this Court holds, as Respondents ask, that service credit discrimination plaintiffs may challenge their current service credit tally at any time, regardless of when policies affecting their accrued service credit were applied, the result will be the virtual elimination of a statute of limitations period for any policy application that either directly or indirectly affected the person's service credit. According to that logic, an employee could do as Respondents have done and wait two *decades* to challenge the application of a service credit policy that affects their retirement benefits.

Employers must be permitted to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims. Indeed, they are "designed to assure fairness to defendants" and to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New*

York Cent. R.R., 380 U.S. 424, 428 (1965) (internal quotation and citation omitted). The interest of an individual who fails to undertake the "minimal" step of filing a charge to preserve his Title VII claim must therefore give way to the interest of avoiding stale claims. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones").

Even the EEOC recognized the right of employers to some measure of finality when it set the retention period for employers to keep certain personnel and employment records under Title VII at one year from the date the record is made or the personnel action involved occurs, whichever is later, unless a charge has been filed. 29 C.F.R. § 1602.14. The one-year retention period means employers will not destroy relevant documents as part of routine file maintenance before an individual has had the opportunity to file a charge of discrimination with the EEOC. Because Title VII gives some aggrieved individuals up to 300 days from the date of the allegedly discriminatory event to file such a charge, an employer will know whether a particular employment action is the subject of a charge before it destroys any relevant documents.

Expanding the limitations period well beyond 300 days in cases involving the granting of service credit many years ago would severely prejudice employers who reasonably have relied on the regulation to develop and implement reasonable record destruction policies. The employer will not have any documents

to support decisions it took years ago, which will hamper drastically its ability to defend itself against a subsequent discrimination claim. Moreover, such a ruling would going forward, effectively require employers to save *all* employment records forever, because they would not be able to anticipate which service credit policies would generate discrimination charges, or when. The EEOC expressly rejected placing such a burden on employers by limiting Title VII's recordkeeping requirements to one year, unless a charge has been filed.

This Court should reject the invitation to unravel the very important protection Title VII's statute of limitations affords employers against stale claims.

CONCLUSION

For the foregoing reasons, the *amicus curiae* urges the court to reverse the decision below and hold that AT&T is not required to give service credit for pregnancy leave taken prior to the 1978 effective date of the Pregnancy Discrimination Act.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 07-543

IN THE
Supreme Court of the United States

AT&T CORPORATION,
Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET;
LINDA PORTER; ELIZABETH SNYDER;
COMMUNICATIONS WORKERS OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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September 15, 2008

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BRIEF FOR THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONER

The ERISA Industry Committee ("ERIC") respectfully submits this *amicus curiae* brief in support of the Petitioner, AT&T Corporation ("AT&T"). Correspondence reflecting the consent of the parties to the filing of *amicus curiae* briefs has been filed with the Clerk of the Court.[1]

[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity other than *amicus curiae* and its members made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

ERIC is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans providing benefits to millions of active workers, retired persons, and their families nationwide. ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit design or administration.[2] This is such a case.

ERIC has a strong interest in the issue presented, which could require pension plans sponsored by its member companies to pay out benefits substantially exceeding the benefits that their sponsors anticipated, with a reasonable degree of certainty, when they funded these plans over the years. A sizeable increase in a plan's benefit payment obligations could substantially increase the sponsor's funding obligations and in some instances could cause a plan to be inadequately funded. In addition, a decision requiring a plan administrator to re-visit and re-create leave and service records that are over thirty years old and to re-calculate thousands of employees' and former employees' pension and other benefits would impose enormous

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[2] *See, e.g., LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020 (2008); *Beck v. PACE Int'l Union*, 127 S. Ct. 2310 (2007); *General Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

costs and administrative burdens on plans and their sponsors and administrators. Given the finite amount of money that employers can spend on these arrangements, these costs will ultimately be borne by plan participants in the form of reduced wages, decreased future benefits, and the like.

All of ERIC's member companies, even those for whom service credit calculation under the Pregnancy Discrimination Act ("PDA") is not an issue, are concerned about any precedent that would require retroactive application of legislation to pension plans. "Rewriting history" by requiring alteration of the factors that determine the size of pension distributions can put the funding of those plans in grave danger and threatens the benefit security of current and future plan participants and their beneficiaries.

Because of the importance of these issues to its member companies, ERIC respectfully urges that the decision below be reversed.

SUMMARY OF ARGUMENT

Imposition of retroactive liability in this case is improper for at least two reasons. The first reason, explained by Petitioner AT&T in its brief, is that there has been no violation of Title VII of the Civil Rights Act of 1964. The second, addressed in this *amicus curiae* brief, is that even if there has been a violation of Title VII, the retroactive relief sought by respondents is improper. In support of this point, this brief makes two arguments:

1. The stability of pension and other employee benefit plans is of the utmost importance to the millions of workers, retirees, and family members who currently depend upon plan benefits or expect to receive them in the future. The financial soundness of pension and other benefit plans depends, in turn, upon adequate funding, which itself requires the ability to predict with a reasonable degree of certainty what the plans' obligations to their current and future participants and beneficiaries will be. These funding obligations are reflected in statute. When the reasonable assumptions and data upon which a plan's funding decisions have been based—including, in this case, calculations concerning length of service—are suddenly altered by a judicial decision leading to an increase in the plan's benefit obligations, there is a significant risk that the plan will have insufficient resources to cover the new obligations. In the best case, this underfunding would require unanticipated additional expenditures by the plan; in the worst case, it could jeopardize the plan's stability and even lead to its termination. On a nationwide scale, retroactive adjustments of the factors that determine the size of pension distributions could pose a serious threat to pension plans, their sponsors, and their participants and beneficiaries.

2. This Court has already addressed the specific type of retroactive liability at issue in this case: a pension plan's liability under Title VII for discrimination on the basis of sex. At least three decisions establish this Court's recognition that in the context of pension plans, retroactive liability for sex-based discrimination is rarely (if ever)

appropriate. *See City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *Florida v. Long*, 487 U.S. 223 (1988).

ARGUMENT

I. A Retroactive Change to Service Calculations Such as That Ordered by The Ninth Circuit Poses a Real Threat To Pension Plan Funding.

The Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, imposes on pension and other employee benefit plans a number of complex rules designed to protect the integrity of those plans and the expectations of their participants and beneficiaries. ERISA's statement of purpose notes that "many employees with long years of employment are losing anticipated retirement benefits," that employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and that statutory protection is necessary to "assur[e] the equitable character of such plans and their financial soundness." *Id.* § 1001(a).

ERISA does not require employers to establish employee benefit plans, nor does it define the benefits that must be provided or the method of calculating those benefits. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). Rather, ERISA seeks "to ensure that employees will not be

left empty-handed once employers have guaranteed them certain benefits" by making as certain as possible that pension fund assets will be adequate to provide expected benefits payments. *Lockheed*, 517 U.S. at 887; *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

In order to achieve the goal of "protect[ing] . . . the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. § 1001(b), Title I of ERISA "requires administrators of all covered pension plans to file periodic reports with the Secretary of Labor, mandates minimum participation, vesting and funding schedules, establishes standards of fiduciary conduct for plan administrators, and provides for civil and criminal enforcement of the Act." *Nachman Corp.*, 446 U.S. at 361 n.1. Title IV of the Act, 29 U.S.C. § 1301 *et seq.*, "created the Pension Benefit Guaranty Corporation (PBGC) and a termination insurance program to protect employees against the loss of 'nonforfeitable' benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full." *Nachman Corp.*, 446 U.S. at 361 n.1. *See also Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6-7 (2004); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717 (1989).

ERISA requires employers who sponsor defined benefit plans—*i.e.*, plans that promise a benefit based on a specified formula set forth in the plan—to fund those plans in accordance with statutory minimum funding requirements. *See* 29 U.S.C. § 1082; 26 U.S.C. § 412. The amount of contributions required for a plan year under the minimum funding rules is generally the amount

needed to fund benefits earned during that year plus that year's portion of other liabilities that are amortized over a period of years. The funding requirements are intended to ensure that the employer sets aside funds that are estimated to be sufficient, with cumulative investment earnings, to provide the benefits promised under the plan. This undertaking entails an estimate of the plan's actuarial liability, *i.e.*, the amount of benefits that will be paid under the terms of the plan. "The estimate of benefits paid depends on three things: the benefit provisions of the pension plan; the characteristics of the participants in the plan (age, sex, salary, and length of service); and the actuarial assumptions used to predict the amount of future benefit payments." Everett T. Allen, Jr. *et al.*, *Pension Planning* 155 (6th ed. 1988); *see also* Dan M. McGill *et al.*, *Fundamentals of Private Pensions* 595-616 (8th ed. 2005).[3]

While the funding obligations include some estimates and are recalibrated from year to year based on actual experience, a retroactive adjustment to service credits alters one of the key factors (length of service) on which a plan would have relied in calculating future benefit payments and, therefore, the sponsor's current funding obligations. *Cf.* 29 U.S.C. § 1084(c)(6)(D) (treating "service," together with age, compensation, death, and disability as

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[3] The Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 ("PPA"), amended ERISA to provide a new set of rules for determining minimum required contributions for plan years beginning after December 31, 2007. Both the new and old rules turn on a reasonable estimate of benefit liability.

events that are "reasonably and reliably predictable"). Consequently, if the length of service is retroactively adjusted as ordered by the court below, an employer with a plan similar to AT&T's would have consistently under-estimated its plan's benefit liabilities (for the thirty years since the PDA was enacted) when it calculated its funding obligations under ERISA. This circumstance could cause a plan to be inadequately funded, triggering additional funding requirements under ERISA, 29 U.S.C. § 1082.[4] In the worst case, it could lead to plan termination and an assumption of liabilities by the Pension Benefit Guaranty Corporation. In both situations, the adverse consequences are ultimately borne by plan participants and plan beneficiaries.

II. This Court Has Established That Retroactive Liability Presents "Special Dangers" to Pension Plans.

Recognizing the important funding considerations discussed above, this Court has repeatedly reached the "conclusion that retroactive

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[4] Plans that are "at risk" (generally meaning a large plan that is less than 80% funded using regular assumptions and 70% funded using special funding assumptions) are subject to more rapid funding requirements, and employers whose plans are at risk are prohibited from funding nonqualified plans for corporate insiders. *See* PPA, Pub. L. No. 109-280, §§ 102, 112, 116; 120 Stat. 780, 789, 826, 856, *codified at* 26 U.S.C. §§ 409A(b)(3), 430(i). In addition, regardless of whether a plan is at risk, a plan that is less than 80% funded generally cannot be amended to increase liabilities and cannot make certain benefit payments, and plans that are less than 60% funded must also cease all benefit accruals. *See* PPA, Pub. L. No. 109-280, §§ 103, 113; 120 Stat. 780, 809, 846, *codified at* 26 U.S.C. § 436.

liability [is] inappropriate in Title VII pension plan cases." *Florida v. Long*, 487 U.S. 223, 236 (1988). On at least three occasions, this Court "identified three criteria for determining whether retroactive awards are appropriate in Title VII pension cases involving" discrimination on the basis of sex, *id.* at 230, and on each occasion, this Court held that the unique situation of pension plans made it particularly inappropriate to subject them to retroactive awards.

A. This Court Has Recognized that Retroactive Liability Is Inappropriate in Title VII Pension Plan Cases.

This Court first addressed the application of Title VII's remedial principles to pension plans in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). In *Manhart*, the defendant's female employees were required to make larger contributions to the pension fund than were their male coworkers. This Court held that this practice constituted discrimination on the basis of sex, in violation of Title VII. 435 U.S. at 711, 717. But it further held that the retroactive relief sought by the plaintiffs—restitution of their excess contributions—was inappropriate. *Id.* at 723.

In so holding, this Court recognized the "presumption in favor of retroactive relief" for Title VII violations, but stressed several reasons why that presumption should not apply to the case before it, particularly given the "special dangers" that retroactive relief presents to pension plans. *Id.* at 719, 721-23 & n.40. First, although the Court

determined that the defendant's practice was unlawful, the state of the law until the Court's holding was unclear, so that "conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the [defendant's] was entirely lawful." *Id.* at 720. Second, there was no reason to think that the prospect of a retroactive award was "needed to cause other administrators to amend their practices to conform to this decision." *Id.* at 720-21. And third, permitting retroactive relief would pull the rug out from under countless insurance and pension plans throughout the nation: retirement plans "depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation." *Id.* at 721.

The Court explained that "[t]he occurrence of major unforeseen contingencies . . . jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect." *Id.* It therefore held that it would be an "abuse of discretion" to require retroactive compliance with its interpretation of Title VII—even though the retroactive liability for the individual plan before the Court would not have been especially severe. *See Manhart v. City of Los Angeles, Dep't of Water & Power*, 553 F.2d 581, 592 (9th Cir. 1977) ("The

impact of returning the excess contributions to the plaintiffs in this case is far from oppressive. The amount involved is only 15% of the contributions made by a minority of the Department's employees for the 33-month period from April 5, 1972 to December 31, 1974."), *rev'd*, 435 U.S. 702 (1978).

The Court concluded that "*the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.*" *Manhart*, 435 U.S. at 721 (emphasis added); *see also id.* at 721-22 ("The EEOC itself has recognized that the administrators of retirement plans must be given time to adjust gradually to Title VII's demands. Courts have also shown sensitivity to the special dangers of retroactive Title VII awards in this field.") (footnote omitted).

Subsequent decisions of this Court have reaffirmed *Manhart* and confirmed that the three factors identified in that decision will, in general, militate against retroactive relief in pension plan cases. Hence, in *Norris*, the Court held that offering retirement *benefits* that differed based on sex violated Title VII (just as requiring *contributions* that differed based on sex violated Title VII in *Manhart*), but it still held that "benefits derived from contributions made prior to this decision may be calculated as provided by the existing terms of the [challenged] plan." *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1075 (1983) (per curiam). In an opinion joined in relevant part by a majority of the Court, Justice Powell explained that retroactive relief was improper for the same reasons cited in *Manhart*: "Reserves normally are sufficient to cover

only the cost of funding and administering [a] plan. Should an unforeseen contingency occur, such as a drastic change in the legal rules governing pension and insurance funds, both the insurer's solvency and the insured's benefits could be jeopardized." *Id.* at 1106 (Powell, J., joined by Burger, CJ, and Blackmun, Rehnquist, and O'Connor, JJ., dissenting in part and concurring in part).

Finally, in *Long*, this Court not only held it improper in the particular case before it to require retroactive adjustments to retirement benefits, 487 U.S. at 229-40, but also explained that *Manhart* and *Norris* had established a general presumption that pension plans should not be subject to retroactive awards. *See id.* at 235 ("In the pension context, we have considered whether retroactive awards are necessary to further the purposes of Title VII and to ensure compliance with our decisions, and we have concluded that retroactivity is not required."); *id.* at 236 ("[W]e concluded, in general terms, that the '[usual] presumption in favor of retroactive relief' should not be applied to this type of Title VII pension plan suit." (quoting *Manhart*, 435 U.S. at 723)).

B. The Criteria Identified by This Court Establish that Retroactive Liability Would Be Improper In This Case.

The premise of the *Manhart* line of decisions is that the defendant engaged in conduct that violated Title VII—albeit conduct that, at the time, was reasonably thought to be lawful, making it inequitable to impose retroactive relief. AT&T's brief explains why AT&T has not violated Title VII: its

imposition of a cap on the service credit available to employees taking pregnancy leave was lawful at the time the cap was implemented, in the years before the PDA was enacted; and its recent determinations of eligibility for pension and other benefits based on service credits previously awarded are not new violations of Title VII.[5] Br. for Pet'r at 15-47. It goes without saying that if there has been no violation of Title VII, there can be no relief under Title VII. But even if this Court determines that AT&T has in fact violated Title VII, it should still hold that the relief sought is retroactive and therefore inappropriate under the *Manhart* factors.

"The first criterion [is] the extent to which new principles of law have been established," that is, whether the employer was "on notice" that its pension plan was providing benefits in violation of Title VII. *Long*, 487 U.S. at 230. This factor weighs against retroactivity in the instant case for at least two reasons: (1) If it was unlawful at all to cap service credits for employees taking pregnancy leave but not for employees taking other types of disability

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[5] In connection with the question of whether AT&T has committed any recent act of discrimination, it is worth noting this Court's rejection of the notion that a plan sponsor should be liable on a continuing basis for all past conduct. *See Long*, 487 U.S. at 239 ("It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation. . . . In the pension fund context, a continuing violation principle in every case would render employers liable for all past conduct, regardless of [when] the liability principle was first announced . . . . We cannot recognize a principle of equitable relief that ignores the essential assumptions of an actuarially funded pension plan.").

leave, that unlawfulness was not clearly established at the time the cap was implemented (*i.e.*, in the years prior to the enactment of the PDA). *See General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (pre-PDA decision holding that excluding pregnancy-related disabilities from disability benefits plan was not sex-based discrimination under Title VII); *see also Pallas v. Pacific Bell*, 940 F.2d 1324, 1325 (9th Cir. 1991) (citing *Gilbert* for proposition that prior to the PDA, "the law did not require employers to treat pregnant women like temporarily disabled men"); *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 823 (7th Cir. 2000); *In re Southwestern Bell Tel. Co. Maternity Benefits Litig.*, 602 F.2d 845, 848 (8th Cir. 1979). (2) If it is unlawful at all to make current eligibility determinations for pension and other benefits based on previously made awards of service credits (where the awards were either lawful or reasonably believed to be lawful when made, and where the awards were made decades ago), this unlawfulness has not yet been clearly established. This uncertainty is clear from the circuit split that this Court is being asked to resolve in this case.

The second criterion is "whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance." *Long*, 487 U.S. at 230. As this Court has explained, the answer is generally no "[i]n the pension context." *Id.* at 235. The answer is also no in this case. When the PDA was enacted, AT&T (like all other responsible employers) promptly stopped making distinctions on the basis of pregnancy in the award of service credits. *See id.*

(noting that defendant had "acted immediately" to modify its pension plans after the controlling law was clarified by the Court); *Manhart*, 435 U.S. at 706 (while action was pending, defendant amended its plan to eliminate sex-based distinctions). Therefore, as in *Manhart*, an award of retroactive relief in this case is not necessary to prompt any change in prospective conduct.

The third criterion is "whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by [the Court's] decision." *Long*, 487 U.S. at 230. As this Court has explained, "[r]etroactive liability could be devastating for a pension fund." *Manhart*, 435 U.S. at 722. If a pension plan is obliged to meet increased payment obligations with assets that were accumulated on the basis of assumptions that did not anticipate the plan's increased payment obligations , and "[i]f the reserve proves inadequate," then an employer will have to commit additional resources to address the inadequate funding or, in the worst case scenario, may be forced to terminate the plan altogether. Moreover, this Court looks not only to the burden on the defendant's pension fund, but also to the burden on pension funds nationwide. *Long*, 487 U.S. at 237; *Norris*, 463 U.S. at 1106-07 (Powell, J., joined by Burger, CJ, and Blackmun, Rehnquist, and O'Connor, JJ, dissenting in part and concurring in part); *Manhart*, 435 U.S. at 722 n. 42.

As set forth in Part I, above, the adverse consequences of the decision below extend well beyond AT&T, the telecommunications industry, and companies that have not applied the PDA

retroactively. Plan sponsors rely on the effective date specified in legislation as the point at which they should modify their behavior going forward. A decision by this Court holding that they cannot rely on the rules used to measure employee service or compensation before an act's effective date would be inconsistent with Congress's intent, would require plan sponsors to recalculate employees' prior service or compensation, and could cause plans to be underfunded. *Cf.* Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, 122 Stat. 1624, § 105(b) ("HEART Act") (requiring pension plans to treat military differential payments as compensation, and providing that this amendment "shall apply to years beginning after December 31, 2008"). Where Congress has mandated new service crediting rules and has intended them to apply retroactively, it can and has said so explicitly. *See* ERISA, Pub. L. No. 93-406, 88 Stat. 829, § 203(b)(1) (1974) (prescribing detailed rules regarding effective date of provisions and applicability to existing plans).

The decision below diminishes employers' confidence in their ability to make reliable estimates of both their plans' future benefit obligations and their own future funding obligations. Such uncertainty could further weaken the private pension system by giving employers additional reasons to terminate their plans, to cease benefit accruals under their plans, or to close their plans to new entrants. An imposition of retroactive liability therefore threatens adverse consequences not only for plans like AT&T's that did not award service credit for pregnancy leave, but for all plans

concerned about retroactive adjustment to factors used in estimating their future benefit liability.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 07-543

NOV 14

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law, the Asian American Justice Center, the National Council of La Raza, and People for the American Way Foundation respectfully submit this brief as *amici curiae* in support of Respondents pursuant to Supreme Court Rule 37.3(a), upon the consent of the parties.

Amici are interested in furthering the goal of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination. In this case, *Amici* seek to ensure Title VII's protection against discrimination in seniority benefits. *Amici* were actively involved in the passage of the Civil Rights Act of 1991, which clarified that an intentionally discriminatory seniority system (whether or not the discriminatory purpose is apparent on its face) can be challenged when a person is injured by the application of the seniority system. 42 U.S.C. § 2000e-5(e)(2). *Amici* are concerned that this case may impact the ability of workers to challenge discriminatory seniority systems, including racially discriminatory seniority systems.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amici curiae* certify that this brief was not written, in whole or in part, by counsel for a party, and that no person or entity, other than *amici curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

The Lawyers' Committee is a nonprofit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in employment discrimination cases across the country. In an effort to assist the Court in its interpretation of the laws aimed at eliminating unlawful employment discrimination, the Lawyers' Committee has filed amicus briefs in other Title VII cases, including the related cases of *Ledbetter v. Goodyear Tire and Rubber Co.*, 127 S. Ct. 2162 (2007) and *AMTRAK v. Morgan*, 536 U.S. 101 (2002).

The Asian American Justice Center ("AAJC") is a national nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal, public policy, advocacy, and community services and education on discrimination issues. AAJC and its affiliates have a long-standing interest in employment discrimination issues that have an

impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Council of La Raza ("NCLR") is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. NCLR believes that discrimination against pregnant women in setting pension benefits places women, including Hispanic women, at a disadvantage during their retirement years.

People for the American Way Foundation ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For has hundreds of thousands of members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women, issues which are directly involved in this case. People For seeks to participate in this case in order to help defend the important interests at stake, including the interest of every employee to be treated fairly and equally and free from unlawful discrimination in the workplace.

SUMMARY OF ARGUMENT

In 1991, Congress amended Title VII of the Civil Rights Act of 1964 to clarify that an employee may challenge an intentionally discriminatory seniority system, regardless of whether the system on its face is discriminatory, when the employee is injured by the application of the system. 42 U.S.C. § 2000e-5(e)(2). The plain language and legislative history of the statute evidence the clear intent of Congress to allow employees to challenge discriminatory seniority systems at the time of retirement. With the 1991 amendment, Congress sought to ensure that victims of discrimination had their day in court. Congress recognized that the most logical time for employees to challenge discriminatory seniority systems is the point at which they are actually injured by application of the policy. Congress also sought to prevent a glut of premature, speculative, and unnecessary litigation.

Here, AT&T's facially discriminatory policy denies full seniority credit to women who took pregnancy leave, while it awards full seniority credit to employees who took other forms of temporary disability leave. Respondents' claims are timely because they challenged AT&T's intentionally discriminatory seniority system at the time of retirement, when Respondents were injured by the application of the system. *Amici* respectfully ask the Court to affirm the Ninth Circuit's decision in keeping with Congress' intent to ensure that a cause of action accrues when employees are harmed by

seniority systems that discriminate on the basis of race, color, religion, sex or national origin.

ARGUMENT

I. IN 1991, CONGRESS AMENDED TITLE VII TO CODIFY THE RULE THAT AN EMPLOYEE MAY CHALLENGE AN INTENTIONALLY DISCRIMINATORY SENIORITY SYSTEM UPON RETIREMENT.

In upholding Respondents' claims, the Court of Appeals for the Ninth Circuit correctly recognized Congress' intent to clarify, with the 1991 amendments to Title VII, that an unlawful employment practice occurs when an employee is injured by the application of a discriminatory seniority system, regardless whether it is facially discriminatory and regardless of how long the system has been in place. In the case of a system that discriminates with respect to the calculation of retirement benefits, the injury occurs upon retirement, when the employee's benefits are calculated. In the 1991 amendments, Congress added a new Section 706(e)(2) (codified at 42 U.S.C. § 2000e-5(e)(2)), which explicitly provides that an employee may challenge a discriminatory seniority system when it is adopted, when the employee becomes subject to the system, or when the employee is injured by the application of the system. Because both the plain language of the amendment and its legislative history demonstrate that Congress wished to preserve employees' rights to challenge longstanding discriminatory seniority systems, the

Ninth Circuit correctly found Respondents' claims to be timely.

A. The Plain Language of Section 706(E)(2) of Title VII Provides That an Unlawful Employment Practice Occurs When an Individual Is Actually Injured by the Application of the Seniority System, i.e., at the Time of Retirement When the Pension Is Set.

Section 706(e)(2) of Title VII ("the amendment"), added to the statute as part of the Civil Rights Act of 1991, provides that

> an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, *or when a person aggrieved is injured by the application of the seniority system or provision of the system.*

42 U.S.C. § 2000e-5(e)(2) (emphasis added). The language of the amendment makes it clear that Congress intended to permit employees to challenge a seniority system that awards discriminatory

retirement benefits at the time of retirement, when the benefits are calculated.

Congress used the disjunctive "or" in the amendment to indicate that an employee can challenge a discriminatory seniority system at three separate junctures, including at the time of retirement. The amendment provides that an unlawful employment practice occurs at (1) the time at which the employer adopts the seniority system, (2) the time at which the plaintiff becomes subject to the system, or (3) the time at which the plaintiff is injured by the application of the system. Because these three events are connected by the term "or," Congress intended for employees to be able to challenge discriminatory seniority systems at any one of these three separate junctures. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings..."); *United States v. O'Driscoll*, 761 F.2d 589, 597 (10th Cir. 1985) (term "or" in a statute generally "presumed to be used in the disjunctive sense"). Pursuant to this clear legislative intent, an unlawful employment practice occurs at the time of retirement, when employees are actually injured by the receipt of lesser benefits due to the application of a discriminatory system.

The interpretive rule against surplus language, which requires that no part of a statutory provision should be construed so as to be redundant, further confirms this interpretation. *See Duncan v. Walker*,

533 U.S. 167, 174 (2001) ("We are [] 'reluctant to treat statutory terms as surplusage' in any setting.") (citing *Babbitt v. Sweet Home Chapter,* 515 U.S. 687, 698 (1995)). Under this canon of statutory construction, the Court must give independent significance to each word in a statutory provision. *See id.* (Court's duty is "to give effect, if possible, to every clause and word of a statute.") (internal quotes and citations omitted). Because the amendment lists three separate events, any one of which constitutes the occurrence of an unlawful employment practice, each of those three events must have a separate and distinct meaning. The "application" of a discriminatory system must therefore be an event distinct from the adoption of the system or the time at which an employee becomes subject to the system. And under the clear language of the amendment, this distinct event constitutes an independent violation of Title VII.

The common usage and understanding of the phrase "injured by the application" further indicates that Congress intended for individuals to have the opportunity to challenge discriminatory seniority plans at the time of retirement. "When interpreting a statute, we must give words their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (citing *Smith v. United States*, 508 U.S. 223, 228, (1993)). *See also BP America Prod. Co. v. Burton*, 127 S. Ct. 638, 643 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.") (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The common understanding of the phrase "injured by the

application" of a policy is the point in time at which a policy is imposed on an individual to her detriment. This Court has held that "it is too obvious to warrant extended discussion" that an employee is injured by the application of a discriminatory wage system each time she receives a paycheck. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2172 (2007) (quoting *Bazemore v. Friday*, 478 U.S. 385, 396 (1986)). The same principle applies to a retirement plan. With respect to retirement benefits, a worker is "subject to" the retirement plan throughout her employment, but "application" of that plan is a discrete act that occurs upon the calculation of benefits pursuant to the plan. Any other meaning would render the "injured by the application" language meaningless and be contrary to the ordinary understanding of the language of the statute.

Finally, the dictionary definition of the word "application" indicates that Congress intended for individuals to have the opportunity to challenge discriminatory seniority plans at the time of retirement. The American Heritage Dictionary defines "application" as "the act of applying," while "apply" means "[t]o bring into contact with" or "[t]o put into action." *American Heritage Dictionary* 41-42 (4th ed. 2001). An employee comes into contact with a retirement plan at the time benefits are set. The common sense understanding that a retirement plan's "application" is a discrete act that occurs when the benefits are actually calculated is further supported by the definition of the word "application."

In enacting the amendment, Congress explicitly provided that employees may challenge a discriminatory seniority system when they are injured by its application. Because the calculation of retirement benefits pursuant to a seniority system is plainly an application of that system, Congress intended for employees to be able to challenge discriminatory retirement systems at the time of retirement, when their benefits are calculated.

B. The Legislative History of the Amendment Demonstrates That Congress Intended to Ensure That an Employee May Challenge an Intentionally Discriminatory Seniority System, Whether Facially Discriminatory or Facially Neutral, at the Time the Employee Receives a Retirement Benefit.

The legislative history of Section 706(e)(2) confirms that Congress intended to permit employees injured by a discriminatory retirement system to challenge the system upon retirement. Congress enacted the amendment in response to *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989), which involved a challenge to a facially neutral seniority system that plaintiffs alleged intentionally discriminated against women. While recognizing that "[t]here is no doubt, of course, that a facially discriminatory seniority system ... can be challenged at any time," *Lorance* held that the statute of limitations to challenge a facially neutral seniority system begins to run at the time the system is adopted. *Id.* at 912. Because the *Lorance* plaintiffs

did not file suit until they were actually affected by the facially neutral seniority system through demotions, their claims were held to be untimely. *Id.*

The *Lorance* decision was widely criticized as an undue curtailment of employees' rights to challenge discriminatory employment practices, and Congress moved quickly to overturn the ruling. The amendment modifying the *Lorance* rule was part of a series of revisions to the civil rights laws first introduced in Congress in 1989 and ultimately passed as the Civil Rights Act of 1991. One of the purposes of the Civil Rights Act of 1991 was to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." 105 Stat. 1071 § 3(4). As this Court has recognized, Congress enacted Section 706(e)(2) to "respond[] to *Lorance*...by expanding employees' rights to challenge discriminatory seniority systems..." *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994).

The legislative history of Section 706(e)(2) further demonstrates that civil rights advocates, the administration of President George H.W. Bush, and both majority and minority members of Congress agreed that the rule adopted in *Lorance* needed to be modified for at least three reasons: 1) it threatened to deprive employees of access to the courts to challenge discriminatory seniority systems, including those adopted before the passage of Title VII; 2) it encouraged speculative and premature litigation; and 3) it denied employees the right to challenge

discriminatory seniority systems at the most logical point in time – when they were actually injured by the system.

1. The Amendment Was Enacted to Overrule the *Lorance* Court's Restrictions on Employees' Rights to a Day in Court to Challenge Discriminatory Seniority Systems, Including Systems Put in Place Prior to the Enactment of Title VII.

The legislative history of the amendment reflects Congress' understanding that the effects of discriminatory seniority systems may not be felt until long after their enactment. By providing that employees could sue when they were actually harmed by the system, Congress intended to avoid the anomalous result that a discriminatory system could be insulated from challenge precisely because it had been in place for many years.

The Bush administration, which proposed the final text of the amendment, recognized that the *Lorance* rule threatened to deprive employees of the opportunity to challenge discriminatory seniority systems. Deputy Attorney General Donald B. Ayer testified that Congress should provide a remedy to "the parties in *Lorance* who under the Supreme Court decision do not get their day in court with regard to a discriminatory seniority provision." Civil Rights Act of 1990: Hearing on H.R. 4000 Before the H. Comm. on Educ. and Labor, 101st Cong. 392 (1990) (statement of Donald B. Ayer, Deputy

Attorney General, Department of Justice). Access to the courts was a necessary "check on a majority that may not be disposed to serve their interest." *Id.*

Civil rights advocates agreed with the Administration on this point. An advocate for the NAACP testified that the *Lorance* decision had placed "another hurdle before minority group members seeking to vindicate their rights to a workplace free of discrimination." Civil Rights Act of 1990: Hearing on H.R. 4000 Before H. Comm. on Educ. and Labor, 101st Cong. 42-43 (1990) (statement of Benjamin Hooks, NAACP). Another advocate testified that overturning *Lorance* was necessary to "prevent the improper foreclosing of challenges to employer practices that may be discriminatory." Civil Rights Act of 1990: Hearing on H.R. 4000 Before the H. Comm. on Educ. and Labor, 101st Con. 61 (1990) (statement of John H. Buchanan, People for the American Way Foundation).

Members of Congress were particularly concerned that the *Lorance* rule would "bar all challenges to contemporary applications of discriminatory rules adopted prior to 1965 – that is, all the discriminatory rules in existence when Title VII became effective – because the deadline for a timely charge would have expired before Title VII ever came into effect." S. REP. NO. 101-315, pt. 4, at 28. (1990). *See also* H.R. REP. NO. 101-644 (I), pt. 5, at 36 (1990); H.R. REP. NO. 102-40 (I), pt. 3, at 61 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549. To protect employees' rights to

challenge such longstanding discriminatory rules, the Committee Reports of both houses found "a compelling need for legislation to overrule the *Lorance* decision." S. REP. NO. 101-315, pt. 4, at 28. (1990).

The House minority, which recommended the final language of the amendment, recognized that "seniority systems present a particular problem with respect to the advent of the limitations period because such systems often are adopted years before they have an impact on an individual's employment rights." H.R. REP. NO. 102-40 (I), pt. 11, at 153. The minority agreed that "a reversal of *Lorance* is warranted, as, in this area, the Court did restrict Federal civil rights protections in a manner that was inconsistent with the intent of Congress," but recommended altering the text of the amendment, which originally provided that the statute of limitations would begin to run "after the alleged unlawful employment practice occurred or has been applied to affect adversely the person aggrieved, whichever is later." *Id.* pt. 11, at 119. The minority proposed that "broader language" be applied to seniority systems, stating that, "[a]lthough we recognize that the effect of this provision would be to leave the validity of seniority systems unsettled for many years, we believe that it is in keeping with notions of fundamental fairness." H.R. REP. NO. 102-40 (II), pt. 3, at 68. This "broader language" was ultimately adopted as Section 706(e)(2).

2. In Enacting the Amendment, Congress Recognized That Permitting Employees to Sue When Injured by the Application of a Discriminatory Seniority Policy Offered a More Cost-Efficient Approach to Prevent a Glut of Premature, Speculative and Unnecessary Litigation.

Proponents of the amendment feared that the *Lorance* rule, in addition to barring meritorious claims arising out of longstanding discriminatory systems, would lead to needless litigation. The rule would effectively require employees to file suit to preserve their rights without knowing if the seniority system would ever actually harm them.

Both civil rights advocates and the Bush administration warned that the amendment was needed to prevent speculative and unnecessary litigation. A witness from the Association of the Bar of the City of New York Committee on Civil Rights testified:

> *Lorance* means that an employee must almost immediately sue over any policy that could conceivably affect her or him any time in the future. Thus, every worker must attempt to accurately predict the results of policies and treatment on the basis of incomplete and speculative evidence. At best, great numbers of cases would have to be brought so that workers

> preserved their rights. More likely, countless workers will be barred because they do not bring the case quickly enough.

Civil Rights Act of 1990: Hearing on H.R. 4000 Before the H. Comm. on Educ. and Labor, 101st Cong. 495 (1990) (report by Janice Goodman, et al., Assn. of the Bar of the City of New York).

The Deputy Attorney General concurred that "a rule that limits challenges to the period immediately following adoption of a seniority system will promote unnecessary and unfocused litigation. Employees will be forced to challenge the system before it has produced any concrete impact, or forever remain silent." Civil Rights Act of 1990: Hearing on S. 2104 Before S. Comm. on Labor and Human Res. 101st Cong. 112 (1990) (statement of Donald B. Ayer, Deputy Attorney General Department of Justice). *See also* Civil Rights Act of 1990: Hearing on H.R. 4000 Before H. Comm. of Educ. and Labor, 101st Cong. 409 (1990) (statement by the Office of the Attorney General).

The House Committee Reports denounced this effect of the *Lorance* rule as both unfair and impractical. The Committee found that the rule "forces...victims to file speculative charges, and trigger legal processes, before a practice has been applied to harm them." H.R. REP. NO. 101-644 (I), pt. 6, at 73. This requirement "entails an undesirable risk that the suit or charge will prejudice the employee's informal efforts to resolve

the dispute short of such proceedings or litigation." H.R. REP. NO. 102-40 (I), pt. 3, at 60 (1991). The 1991 Report reiterated these concerns and observed that the need for employees to file premature suits to preserve their rights and "causes needless strain on employment relationships."

3. Congress Recognized That the Most Logical Point for Employees to Challenge a Discriminatory Seniority System Is When the Employees Are Actually Injured by the Application of the Policy.

A consensus emerged that the most practical and effective response to the problems posed by *Lorance* was to permit employees to sue when injured by the application of the discriminatory system. Such a rule would encourage employees to resolve grievances outside the courts and would ensure that any disputes that made it to court would be sharply focused on the actual harm to the employee.

Civil rights advocates testified that the amendment was needed to "reestablish[] that the statute of limitations period for challenging employment practices generally does not commence until the concrete effects of the injury are felt by the charging party." Civil Rights Act of 1990: Hearing on S. 2104 before S. Comm. On Labor and Human Res., 101st Cong. 905 (1990) (statement of Norman Dorsen, American Civil Liberties Union). The amendment would therefore ensure that challenges

to discriminatory seniority systems could be brought "at a realistic point in time."

The Bush Administration also testified in favor of "restart[ing] the period for filing a charge each time an employee was injured by the application of a seniority system that was alleged to have been adopted with discriminatory intent." Civil Rights Act of 1990: Hearing on S. 2104 Before S. Comm. on Labor and Human Res. 101st Cong. 112 (1990) (Statement of Donald B. Ayer, Deputy Attorney General Department of Justice). *See also* Civil Rights Act of 1990: Hearing on H.R. 4000 Before H. Comm. Of Educ. And Labor, 101st Cong. 3d Sess. 409 (1990) (statement by the Office of the Attorney General). The Attorney General admonished that it was not enough for employees to be able to challenge a system once it became applicable to them. In the case of employees who first became subject to seniority system when they joined a company, the Attorney General observed that as a practical matter, "most employees would be reluctant to begin their jobs by suing their employers." Civil Rights Act of 1990: Hearing on H.R. 4000 Before H. Comm. of Educ. and Labor, 101st Cong. 409 (1990) (statement by the Office of the Attorney General).

The House Reports clarified that by "permit[ting] persons to challenge discriminatory employment practices when those practices actually harm them," Congress "intends to minimize unnecessary and divisive Title VII litigation between workers and employers, and to promote Title VII's goal of encouraging voluntary settlement of employment

discrimination disputes." H.R. REP. NO. 102-40 (II), pt. 3, at 62; H.R. REP. NO. 102-40 (I), pt. 3, at 62.

The legislative history of the amendment compels the conclusion that employees adversely affected by a discriminatory seniority system may file suit when they receive retirement benefits calculated pursuant to that system. Congress recognized that employees may not feel the impact of discriminatory seniority systems for many years, and the most practical and cost-effective approach to addressing the problem of discrimination is to allow employees to bring suit when they are adversely affected by the application of the system. In the case of a seniority system that determines the award of retirement benefits, the time of injury occurs when the benefits are calculated. *See Maki v. Allete, Inc.*, 383 F.3d 740, 742-44 (8th Cir. 2004) (statute of limitations to challenge discriminatory pension plan begins to run when pension benefits vest).

C. Respondents' Claims Are Timely Because AT&T's Seniority Policy Is Intentionally Discriminatory, and Respondents Challenged AT&T's Policy When They Were Injured by the Application of the Seniority System.

The Ninth Circuit correctly found Respondents' Title VII claims to be timely. *Hulteen v. AT&T Corp.*, 498 F.3d 1001, 1011-12 (9th Cir. 2007). There is no dispute that Respondents filed suit within 300 days of the calculation of their pension benefits. Resp. Br. 7. As demonstrated above, calculation of

pension benefits pursuant to a discriminatory seniority system is an unlawful employment practice under Section 706(e)(2).

The Ninth Circuit properly held that AT&T's seniority system is facially discriminatory, because it distinguishes between similarly situated employees: female employees who took pregnancy-related disability leave and employees who took other types of temporary disability leave. *Hulteen*, 498 F.3d at 1006, 1012 (citing *Pallas v. Pacific Bell*, 940 F.2d 1324, 1327 (9th Cir. 1991)).

As recognized in *Lorance* and confirmed by § 706(e)(2), "a facially discriminatory system (*e.g.*, one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied." 490 U.S. at 913. Such a facially discriminatory policy is intentionally discriminatory. *See Int'l Union, United Auto. v. Johnson Controls*, 499 U.S. 187, 197-200 (1991) (company policy that "explicitly classifies on the basis of potential for pregnancy...evinces discrimination on the basis of sex").

Because AT&T's seniority system is intentionally discriminatory, and Respondents filed suit within 300 days of the calculation of their retirement benefits pursuant to the seniority system, Respondents' Title VII claims are timely.

1. AT&T's Seniority System Is Facially Discriminatory Because It Distinguishes Between Similarly Situated Employees.

AT&T's seniority system discriminates on the basis of sex. As the Ninth Circuit properly held, AT&T's seniority system is facially discriminatory, because it distinguishes between similarly situated employees. 498 F.3d at 1006, 1012. AT&T's seniority system undisputedly treated women who took pregnancy leave less favorably than other similarly situated employees. AT&T's Net Credit Service ("NCS") system distinguished between female employees who took leave due to a pregnancy-related disability and employees who took leave for other temporary disabilities. Pet. App. 9a. In fact, AT&T admits that its seniority policy "treated pre-PDA pregnancy leaves less favorably than other disability leave." Pet. for Cert. at 17. The NCS system "gave employees full credit for all types of temporary medical leave, except one: leave taken for disabilities related to pregnancy." *See* Pet'r Br. at 6.

Under the standard set forth in *Lorance*, this is a facially discriminatory policy, because it "treats similarly situated employees differently," by assigning one group less seniority for the same amount of time served as another. *Lorance*, 490 U.S. at 912, 913 n.5. *See also Maddox v. Grandview Care Center, Inc.*, 780 F.2d 987, 991 (11th Cir. 1986) (upholding district court's finding that leave of absence policy that limited duration of pregnancy

leave, but not leave due to "illness", was facially discriminatory).

2. AT&T's Seniority System Intentionally Discriminated Against Women Who Took Pregnancy-Related Leave in Violation of Title VII.

The facially discriminatory policy adopted by AT&T evidences an intent to discriminate. AT&T intentionally discriminated against Respondents by denying full credit for their pregnancy leave, while granting full credit to similarly situated employees who took other forms of disability leave. AT&T classified Respondents' pregnancy leave as personal leave instead of treating it like any other temporary disability. Pet'r Br. at 5. As such, AT&T set a maximum of 30 days service credit for women who took leave during and after pregnancy. Pet'r Br. at 5. By contrast, AT&T set no such limit for employees who took temporary disability leave. Employees who took disability leave for any reason other than pregnancy received unlimited service credit for the duration of their leave. Pet'r Br. at 5. AT&T's decision to adopt disparate leave policies that singled out one group of workers for less favorable treatment constitutes intentional discrimination. Such facial discrimination, which harms one group of employees and not another based on categories of race or sex, "can surely be regarded as intending to discriminate." *Ledbetter*, 127 S. Ct. at 2173.

It is no defense, as AT&T claims, that Respondents took pregnancy leave prior to the effective date of the Pregnancy Discrimination Act ("PDA"). Title VII always prohibited pregnancy discrimination. Prior to the passage of the PDA, the EEOC recognized that Title VII prohibited discrimination on the basis of pregnancy. The EEOC's 1972 Sex Discrimination Guidelines made clear that disability due to pregnancy must be accorded the same treatment as other forms of disability. Specifically, the guidelines provided that: "employment policies and practices involving matters such as ... the accrual of seniority and other benefits and privileges ... shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disability." 29 C.F.R. § 1604.10 (1973).

The Supreme Court upheld this portion of the EEOC's guidelines in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977), recognizing that Title VII does not "permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role" in child-bearing.

The PDA merely clarified the meaning of sex discrimination under Title VII. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 n.17 (1983) (citing legislative history of PDA stating original intent of Title VII was that discrimination on the basis of pregnancy constituted sex discrimination). The PDA simply confirmed the existing interpretation of the law, as exemplified in

the holding in *Satty*, that discrimination because of pregnancy was prohibited under Title VII. Therefore, AT&T's differential treatment of women who took pregnancy leave constituted unlawful discrimination after the enactment of Title VII in 1964.

Moreover, AT&T intentionally discriminated against Respondents at the time of retirement by purposefully denying full credit for pregnancy leave, while granting full credit to similarly situated employees who took other forms of leave. Both the Eighth and Ninth Circuits have found that an employer's refusal to credit pre-PDA pregnancy leave when calculating post-PDA retirement benefits is an unlawful employment practice under Title VII. In *Maki*, the Eighth Circuit held that a "bridging provision" in an employer's pension plan, which excluded women who were fired due to sex discrimination prior to 1964, violated Title VII. 383 F.3d at 742-43. Similarly, in *Pallas* the Ninth Circuit held that while Pacific Bell's 1972 denial of pregnancy-related benefits was not actionable, the company was "liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy" by denying credit for her pregnancy leave when it calculated eligibility for early retirement benefits. 940 F.2d at 1327.

3. AT&T Intentionally Discriminated Against Respondents at the Time of Retirement by Purposefully Denying Full Credit for Pregnancy Leave, While Granting Full Credit to Similarly Situated Employees Who Took Other Forms of Leave.

AT&T intentionally discriminated against Respondents at the time of their retirement. When Respondents retired, AT&T refused to reinstate the seniority credit that Respondents should have received during their pregnancy leave but for AT&T's intentionally discriminatory leave policy. AT&T admits that its seniority policy permits the "adjust[ment of] an employee's NCS date when 'the date has been calculated incorrectly' or 'the change is necessary to comply with legal requirements.'" JA 56 (¶ 104). Nevertheless, AT&T chose not to credit Respondents for their pregnancy leave as required by Title VII. In denying the full seniority benefits owed to Respondents at the time of their retirement, AT&T affirmatively violated Title VII's prohibition against discrimination on the basis of pregnancy. As such, AT&T engaged in intentional discrimination at the time of Respondents' retirement.

II. THE RULE THAT AT&T ASKS THE COURT TO ADOPT WOULD CONTRAVENE CONGRESS' INTENT TO GUARANTEE THAT A CAUSE OF ACTION ACCRUES WHEN EMPLOYEES ARE HARMED BY SENIORITY SYSTEMS THAT DISCRIMINATE ON THE BASIS OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN.

A. Discriminatory Seniority Systems Continue to Plague the Workplace.

This Court has recognized that the harm caused by discriminatory seniority practices "cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 n.28 (1976). A decision in AT&T's favor in this case would have significant negative effects on employees victimized by seniority systems that discriminate on the basis of race, color, religion, sex or national origin. It would also negate Congress' efforts to ensure employees' rights to challenge these practices in court.

It is beyond dispute that discriminatory seniority systems continue to adversely affect groups protected by Title VII. Of particular concern to *Amici* is the persistence of race-based discrimination in seniority systems today. *See, e.g., City of Hialeah, Florida v. Rojas*, 311 F.3d 1096, 1099 (11th Cir. 2002) (employer classified Latino employees as temporary workers in order to deny benefits); *Harvey by*

Blankenbaker v. United Transp. Union, 878 F.2d 1235, 1244 (10th Cir. 1989) (railroad's seniority system discouraged black chair car attendants from transferring to more desirable positions as brakemen/switchmen); *Casillas v. Federal Express Corp.*, 140 F. Supp. 2d 875, 886 (W.D. Tenn. 2001) (upholding allegations of race and age discrimination in seniority system). Access to the judicial system is an essential tool in effectively eliminating discrimination from the workplace.

As Congress observed in passing the 1991 amendment, seniority systems by their very nature pose unique problems with respect to statute of limitations issues, because the harm they inflict is often felt years after the system's creation. *See* H.R. Rep. No. 102-40 (I), pt. 11, at 153. Discriminatory practices in seniority systems—particularly those that relate to the calculation of retirement benefits—may go unchallenged for years because employees do not know how, or whether, these practices will affect them at retirement. Employees far from retirement age may be reluctant to challenge policies that will affect them years in the future, if at all. *See Heiar v. Crawford County*, 746 F.2d 1190, 1194 (7th Cir. 1984) ("People do not want to begin their employment by suing an employer" over an injury they may suffer in the future).

In enacting Section 706(e)(2) of Title VII, Congress intended to address these difficulties by preserving a right to challenge discriminatory seniority systems at retirement. AT&T urges the Court to reject this rule, maintaining that

Respondents should have challenged its seniority crediting practices decades before these practices adversely affected their retirement benefits. The rule AT&T proposes would eviscerate the scheme Congress adopted in Section 706(e)(2). As a practical matter, it would have the effect of denying many victims of discrimination their day in court, while encouraging others to file speculative and unnecessary lawsuits. Employees who bring such speculative suits would face a substantial risk of dismissal. *See Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007) (to survive a motion to dismiss, plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level"); *Auerbach v. Bd. of Educ.*, 136 F.3d 104, 109 (2d Cir. 1998) (dismissing discrimination challenge against retirement plan because employees had not yet retired).

AT&T's proposed rule is unfair, impractical and would deprive employees of the right to challenge illegal policies at the time of injury. It would do nothing to further Congress' intent to eradicate discrimination in seniority systems.

B. A Decision in AT&T's Favor Would Undermine Congress' Intent to Preserve a Right to Relief for Employees Harmed by Discriminatory Seniority Systems Adopted Prior to the Enactment of Title VII.

AT&T further seeks to nullify Congressional intent and restrict employees' rights to challenge

unlawful discrimination by claiming that Section 706(e)(2) only applies to intentionally discriminatory seniority systems adopted after 1991. *See* Pet'r Br. at 46-47. Nothing could be further from the actual purpose behind the provision. Section 706(e)(2) did not, as AT&T claims, purport to alter a preexisting statute of limitations; it merely clarified that an unlawful employment practice occurs when an employee is injured by the application of a discriminatory seniority system.

Before the *Lorance* decision, courts routinely sustained challenges to intentionally discriminatory seniority systems enacted years earlier, including those adopted prior to the enactment of Title VII. *See Pullman v. Swint*, 456 U.S. 273, 278-79 (1982) (seniority system adopted in 1954 could be held unlawful if structured for a discriminatory purpose); *Wattleton v. Int'l Bhd. of Boiler Makers*, 686 F.2d 586 (7th Cir. 1982) (challenge to discriminatory seniority system brought by employees hired between 1948 and 1968); *Myers v. Gilman Paper*, No. CV 1120, 1981 WL 141, at *9 (S.D. Ga. Feb. 18, 1981) (upholding challenge to discriminatory seniority system that evolved between 1941 and 1965); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 517 (E.D. Va. 1968) (finding seniority lists established before 1966 were intentionally discriminatory).

In enacting Section 706(e)(2), Congress made clear that these decisions were correctly decided, and the original intent of Title VII was to allow "challenges to contemporary applications of discriminatory rules adopted prior to 1965...." S.

REP. NO. 101-315, pt. 4, at 28; H.R. REP. NO. 101-644 (I), pt. 5, at 36; H.R. REP. NO. 102-40 (I), at 62. *See also Bazemore,* 478 U.S. at 396-96. Because the *Lorance* decision threatened to bar such claims, Congress found there was a "compelling need" to overturn the decision. *Id.*

The rule AT&T urges the Court to adopt would lead to the anomalous result of providing additional protection to the worst offenders under Title VII—those whose discriminatory practices have survived for years and continue to injure employees today. This rule must be rejected as contrary to the clear legislative intent of Title VII.

C. This Court's Interpretation of a Seniority Plan "Adopted for a Discriminatory Purpose" Will Have a Profound Effect on Race Discrimination Cases.

AT&T argues that its seniority system is immune from challenge under Section 706(e)(2) because it was not "adopted for a discriminatory purpose." *See* Pet'r Br. at 14. Once again, AT&T incorrectly interprets the statute. Its seniority system on its face discriminates on the basis of sex between similarly situated employees. As such, there can be no question that the policy was adopted for a discriminatory purpose. A contrary interpretation would not only bar Respondents' claims in this case, but would also significantly curtail employees' rights to challenge discriminatory systems rooted in racial discrimination.

Section 706(e)(2) did not alter the rule this Court announced in *Lorance* that "a facially discriminatory seniority system ... can be challenged at any time." 490 U.S. at 912. This is because a facially discriminatory system "by definition discriminates each time it applies." *Id.* at 913 n.5. Section 706(e)(2) extended this rule to facially neutral systems, providing that intentionally discriminatory systems could be challenged when they cause injury, "whether or not [the] discriminatory purpose is apparent on the face of the seniority provision."

The language of Title VII and AT&T's own brief demonstrate that Section 706(e)(2) applies to facially discriminatory seniority systems. Section 703(h) of Title VII provides that an employer may "apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merits system," so long as these differences "are not the result of an intention to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-(2)(h). An intentionally discriminatory system is, by definition, not bona fide. AT&T concedes that Section 703(h) does not apply to facially discriminatory seniority systems. Pet'r Br. at 3. It would be an odd result indeed if the same conduct were considered "intentionally discriminatory" for the purposes of the merits of a Title VII claim, but not for the purposes of determining if the claim is timely.

In the context of racially discriminatory seniority systems, courts have long held that a seniority

system's origins in discriminatory practices—even those that predated Title VII— constituted evidence of discriminatory intent for purposes of Section 703(h). *See Harvey*, 878 F.2d at 1247-48 (in determining whether a seniority system dating back to 1892 was bona fide, court should not "discount evidence of the employer's racially discriminatory practices at the time [the] seniority system was adopted..."); *Quarles*, 279 F. Supp. at 517 (seniority lists established before 1966 and still maintained by the employer had "genesis in racial discrimination" and were intentionally discriminatory).

In denying seniority credit to employees who took pregnancy leave, AT&T plainly intended to discriminate on the basis of sex. The fact that this conduct occurred prior to the enactment of the PDA does not change its purposeful character. Simply put, any seniority system that facially discriminates on the basis of race, color, religion, sex or national origin was adopted for a discriminatory purpose. This is so even if the plan was adopted before the particular form of discrimination explicitly came within the ambit of Title VII. A contrary interpretation would curtail Congress' efforts to eradicate present-day injuries caused by the pervasive discrimination in employment that led to the passage of Title VII.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Ninth Circuit Court of Appeals.

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AMICUS CURIAE BRIEF

No. 07-543

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IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF INTEREST[1]

The **National Employment Lawyers Association** (NELA) is the only professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who represent employees who have suffered from employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of Title VII and other anti-discrimination statutes, to ensure that the goals of those statutes are fully realized. Some of the more recent cases before the Supreme Court of the United States in which NELA has filed *amicus curiae* briefs include *Crawford v. Metropolitan Gov't of Nashville & Davidson County* (no. 06-1595); *SprintD United Management Co. v. Mendelsohn*,

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. Both parties have consented to the filing of this brief, and letters indicating the parties' consent have been filed with the Clerk of the Court.

128 S.Ct. 1140 (2008); *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); and *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, 550 U.S. __, 127 S. Ct. 2162 (2007).

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in overcoming glass ceiling discrimination, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the workplace through public education and legal advocacy, most recently as *amicus curiae* before this Court in *Burlington Northern & Santa Fe Railway Co. v. White*, *Ledbetter v. Goodyear Tire & Rubber Co.*, *BCI Coca-Cola Bottling Company of Los Angeles v. Equal Employment Opportunity Commission*, and *Crawford v. Metropolitan Government of Nashville & Davidson County, Tennessee.*

Public Justice, P.C. is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in the courts. We specialize in precedent-setting and socially significant individual and class action litigation designed to advance civil rights and civil liberties, consumer and victims' rights, environmental protection and safety, workers' rights, toxic torts, the preservation of the civil justice system, and the protection of the poor and powerless. In fighting against discrimination and retaliation, we have litigated numerous cases under federal civil rights statutes, including Title VII of the

Civil Rights Act of 1964, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Public Justice believes that AT&T's present-day application of a facially discriminatory pension-setting policy violates Title VII, and is concerned that AT&T's narrow interpretation of Title VII, if adopted, would leave thousands of women vulnerable to pregnancy-based sex discrimination perpetrated 30 years after the enactment of the Pregnancy Discrimination Act.

SUMMARY OF ARGUMENT

Thirty years after the passage of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) ("PDA"), AT&T continues to calculate retirement benefits in a manner that discriminates against women who took leaves of absence on account of pregnancy during the course of their employment. The Respondents are AT&T employees who took pregnancy-related leaves of absence before the passage of the PDA, and retired between 1994 and 2000 with smaller pensions than they would have received had AT&T calculated their pension benefits in the same manner as it does for employees who took leaves of absence on account of conditions other than pregnancy. In AT&T's view, it should be free, today, to continue calculating pensions using a system that gives less service credit to pre-PDA pregnancy-related leave than to other types of disability leave.

Amici NELA, Public Justice and Pick Up the Pace argue that AT&T's position is precluded by the precedent this Court established in *Bazemore v. Friday*, 478 U.S. 385 (1986), and recently reaffirmed in *Ledbetter*

v. Goodyear Tire & Rubber Co., 550 U.S. __, 127 S. Ct. 2162 (2007). Under *Bazemore* and *Ledbetter*, employers violate Title VII when they make present-day compensation decisions using systems that perpetuate disparities created by pre-enactment discrimination—as AT&T did here when, at the time of Respondents' retirement, it calculated their pension benefits using its "NCS computation system."

ARGUMENT

I. *BAZEMORE v. FRIDAY* ESTABLISHED THE CONTOURS OF AN EMPLOYER'S DUTY TO RESPOND WHEN TITLE VII, AS AMENDED, RENDERS ITS EMPLOYMENT PRACTICES UNLAWFUL.

Over twenty years ago in *Bazemore v. Friday*, 478 U.S. 385 (1986), a unanimous Supreme Court squarely addressed and answered the core legal question raised by this case: What are the contours of an employer's duty to change employment practices in response to a change in the law that expands Title VII protection against discrimination in the workplace?

In concert with the *Bazemore* plaintiffs, Solicitor General Charles Fried also petitioned the Court for *certiorari* on behalf of the United States, seeking "review of the court of appeals' ruling that Title VII provides no remedy for the [North Carolina Agricultural Extension] Service's post-Act failure to eliminate disparities in salaries between black and white agents hired *before* 1965, even though there is no dispute that

those disparities had their origin in racial discrimination." *See* Reply Memorandum for the Petitioners on Petition for a Writ of Certiorari, *United States v. Friday*, No. 85-428, *1985 U.S. S. Ct. Briefs LEXIS 507*, at *1 (Oct. 30, 1985).[2] The Government's brief challenged the Fourth Circuit's holding that "as a matter of law, the Service has no obligation under Title VII to eliminate post-Act salary differentials attributable to pre-Act racial discrimination." *Id.* at *3.

Speaking for a unanimous Supreme Court, in a concurring opinion joined by all its members, Justice Brennan wrote:

> "The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent

[2] The cited *Bazemore* opinion decided both *Bazemore v. Friday* and *United States v. Friday*.

> an employer continued to engage in that act or practice, it is liable under that statute." (478 U.S. at 395)

Bazemore was decided in the context of Congress' 1972 amendment to Title VII, expanding its coverage to public employers. Prior to the enactment of Title VII, the North Carolina Agricultural Extension Service had maintained a racially segregated workforce, and black employees were paid less than white employees for doing the same jobs. After Title VII went into effect, the Extension Service integrated the workforce, and began to pay new hires on an equal basis. With respect to employees originally hired under the segregated system, however, racial inequality in compensation persisted.

This Court overturned the decision of the Fourth Circuit, disapproving its application of *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), to relieve the Extension Service of Title VII liability. In addition, it announced a new set of principles tailored to ensure prompt compliance with Title VII, while balancing the interests of both employers and employees. Its holding protected the Extension Service from retroactive liability for its *past* racial discrimination, but it also provided recovery for *present* discrimination caused by policies and practices that perpetuate pre-existing racial disparities.

Bazemore established the contours of an employer's duty to respond to the expansion of rights created by Title VII and its subsequent amendments: (1) Title VII does not require restitution for pre-enactment

discrimination; (2) discontinuing discriminatory practices is necessary, but may not be sufficient to avoid Title VII liability; and (3) employers who make post-enactment compensation decisions using methods that perpetuate disparities created by pre-enactment discrimination violate Title VII whenever those methods are applied. It was in this context that the Court announced what came to be known as the "paycheck accrual" rule: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Bazemore*, 478 U.S. at 395.

In 2007, this Court announced its controversial *Ledbetter* decision. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. __, 127 S. Ct. 2162 (2007). The Court declined to apply *Bazemore's* "paycheck accrual rule" in an individual pay discrimination case that involved neither statutory change nor systemic discrimination. At the same time, as will be argued more fully below, the *Ledbetter* majority took great pains to distinguish the case then before it from *Bazemore*, and to reaffirm the continued vitality of *Bazemore* as precedent for cases involving systemic discrimination, such as this one.

AT&T v. Hulteen presents the classic *Bazemore* scenario, and the Ninth Circuit *en banc* majority below correctly chose to decide the case in accordance with the *Bazemore* principles. *Evans* and its cited progeny are distinguishable as cases that do not involve the duty of an employer to make systematic changes to a facially discriminatory pay structure in response to legislative action. *Ledbetter*, 127 S. Ct. 2162 at 2174 nn.5-6 (distinguishing *Bazemore* from *Evans*).

II. THE NINTH CIRCUIT CORRECTLY APPLIED *BAZEMORE* TO THE FACTS OF THIS CASE.

A. This Case Presents a Classic *Bazemore* Scenario.

The case comes before this Court on stipulated facts set forth in the Joint Appendix ("JA"). AT&T's pension plan calculates benefits based on an employee's "'period of continuous employment in the service of the Company.'" JA 38 ¶17. AT&T maintains a service calculation system that assigns each employee a Net Credited Service Date ("NCS" date), consisting in his or her original date of hire "adjusted" for periods during which no service credit has been accrued. JA 39 ¶18.

Prior to passage of the PDA, AT&T maintained a two-tier leave policy that treated pregnant employees differently from other employees similar in their ability and inability to work. *See generally* JA 47-52 ¶¶66-88. AT&T provided full service credit to employees who took a leave of absence from work on account of disabilities other than pregnancy, but not to employees on leave of absence from work on account of pregnancy. JA 48-49 ¶¶67-68, 71.

The two-tier leave policy also involved other provisions affecting only pregnant employees, which had additional impact on their service credit accrual. Pregnant employees who became temporarily disabled for a different reason received no NCS credit for that period, while employees disabled by reasons other than pregnancy who became temporarily disabled for a

different reason received NCS credit for the entire period of disability. JA 50 ¶¶76-77. Pregnant employees were subject to "forced leave" policies requiring them to begin leaves prior to the onset of pregnancy disability, while employees anticipating temporary disability leave for other reasons were not subject to "forced leave" policies. JA 51 ¶¶81-82. Pregnant employees were not guaranteed reinstatement to the same or similar job at the expiration of their leave, while such reinstatement generally was guaranteed to employees on leave for disabilities other than pregnancy. JA 51-52 ¶¶85-86. Pregnant employees did not receive service credit for time off work attributed to forced leave or failure to reinstate. JA 49-52 ¶¶75-76, 84, 88.

The net result of these discriminatory policies is that women returning from pre-PDA pregnancy leave received a substantial downward service credit "adjustment" to their NCS date ("pregnancy-adjusted NCS date"), whereas employees returning from disability leaves for conditions other than pregnancy retained whatever NCS date they had prior to the disability leave. JA 39 ¶18.

Both before and after the PDA went into effect, AT&T made retirement benefit determinations using its "NCS calculation system" to calculate length of service. Length of service, known as the TOE ("term of employment") was, and is today, computed by subtracting the employee's NCS date from the date of his or her retirement. JA 38, 40 ¶¶17, 22. As a result of the service credit disparity created by AT&T's discriminatory two-tier leave policies, and its current use of pregnancy-adjusted NCS dates to calculate length

of service, Respondents received lower pensions upon retirement than similarly situated employees with the same history of continuous service who were not affected by pregnancy. JA 40-42 ¶¶25-28, 30, 34 (Noreen Hulteen); JA 42-44 ¶¶35-39, 41, 46 (Eleanora Collet); JA 44-45 ¶¶47-49, 52, 55 (Linda Porter); JA 45-47 ¶¶56-59, 63-65 (Elizabeth Snyder).

It is beyond dispute that AT&T's current use of its "NCS calculation system" to calculate retirement benefits perpetuates the disparity created by its pre-Act pregnancy discrimination.[3] Thus, the Ninth Circuit's *en banc* majority correctly analyzed the issues in accordance with the *Bazemore* principles described above, and correctly concluded that AT&T's current pension benefit computation system violates Title VII.

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[3] Respondents and other *amici* argue convincingly that AT&T's disparate treatment of pregnancy leave violated Title VII even before the PDA was enacted. However, whether or not AT&T's policies were legal before the enactment of the PDA is irrelevant to the *Bazemore* analysis presented here:

> "A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under the statute."

478 U.S. at 395. Once the PDA went into effect, AT&T no longer could employ a retirement benefit compensation system that perpetuated pre-PDA disparities when making post-PDA compensation decisions, even if it could have done so earlier.

B. AT&T's Arguments for Reversal of the Ninth Circuit's Decision are Foreclosed by *Ledbetter v. Goodyear Tire.*

AT&T urges reversal of the Ninth Circuit's opinion on three grounds: (1) Respondents' challenge is not timely; (2) the challenged practice does not constitute intentional discrimination; and (3) imposing liability on these facts necessarily involves a prohibited retroactive application of the PDA in violation of this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). None of these arguments withstand close scrutiny.

1. Respondents' challenge to AT&T's pension benefit determinations is timely.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. __, 127 S. Ct. 2162 (2007), this Court declined to apply *Bazemore's* "paycheck accrual" rule when adjudicating a statute of limitations defense in an *individual* case involving "long-past performance evaluation[s]" made within a facially neutral pay structure. In contrast, it approved its use in cases involving *systemic* practices that are the "mere continuation" of a facially discriminatory payment scheme:

> "Noting that *Evans* turned on whether any present violation existed, Justice Brennan stated that the *Bazemore* plaintiffs were alleging that the defendants had not from the date of the Act forward made all their employment decisions in a wholly

> nondiscriminatory way—which is to say that they had engaged in fresh discrimination. . . . [T]he Court's holding . . . focused on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure." (*Ledbetter*, 127 S. Ct. at 2173 (emphases deleted; internal quotation marks, brackets and citations omitted))

AT&T's method for computing retirement benefits is indisputably a "mere continuation" of its pre-existing discriminatory retirement benefit computation structure. *See* II.A, *ante* at 7-10. AT&T engages in fresh discrimination today when, by using pregnancy-adjusted NCS dates to compute longevity of service, it re-imposes the service credit disparity created by its pre-PDA discriminatory pregnancy leave policies.

The distribution of retirement benefits pursuant to a discriminatory computation system is a "freestanding violation" that "may *always* be charged within its own charging period *regardless of its connection to other violations.*" *Ledbetter*, 127 S. Ct. at 2174 (emphasis added). Furthermore, "*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure." *Id.*

Respondents filed EEOC charges within the charging period applicable to benefit determinations, and have complied with all the administrative prerequisites for filing a lawsuit alleging violation of

Title VII. JA 55 ¶97. Because these benefit determinations constitute current acts of discrimination, Respondents actions are timely.

2. AT&T's pension benefit calculation system is a discriminatory pay structure within the meaning of *Ledbetter*.

In *Ledbetter*, this Court explicitly reaffirmed *Bazemore's* holding that retention of a facially discriminatory pay structure constitutes intent to discriminate: "An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate . . . *as long as the structure is used.*" 127 S. Ct. at 2173 (emphasis added). Justice Alito did caution, however, that a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied. *Id.* at 2174. AT&T challenges the Ninth Circuit decision on that basis as well.

AT&T's pension benefit determination system meets the *Ledbetter* definition of a facially discriminatory pay structure, *i.e.*, one that puts some employees on a lower scale because of their membership in a protected category. *Id.* at 2173. The use of pregnancy-adjusted NCS dates to compute longevity of service puts employees affected by pregnancy at a lower pension benefit level simply because of their membership in that protected category.

AT&T's pension benefit determinations are made using its "NCS system" which, on its face (1) credits

time spent on leave for all temporary disabilities except pre-PDA pregnancies, and (2) excludes time off work created by policies and practices that were applied *only* to pre-PDA pregnancies (*e.g.*, forced leave, subsequent disability).[4] As a result, employees affected by pre-PDA pregnancies are classified as having shorter terms of employment, and their pension benefits are set at a correspondingly lower level.

Contrary to AT&T's assertion, a system need not explicitly label the disparate treatment it imposes as sex discrimination in order for it to be "facially" discriminatory. After enactment of the PDA, a retirement benefit computation system that continues to treat employees affected by pregnancy less favorably than other employees "similar in their ability or inability to work" facially discriminates against them on the basis of sex, even if it is called an "NCS system." 42 U.S.C. §2000e(k); *Pallas v. Pacific Bell*, 940 F.2d 1324, 1327 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992). Discriminatory animus is not required either. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect).

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[4] Indeed, continued use of this system puts AT&T in direct violation of the Pregnancy Discrimination Act, which requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k).

Furthermore, AT&T's "NCS system" is not neutrally applied. The system is applied to discriminatory "NCS dates" created by AT&T's now discontinued two-tier leave system. Thus, Respondents' "adjusted" NCS dates are no more "neutral" than the lower base salaries of black employees in *Bazemore* who began employment under the racially segregated system that predated Title VII. Continued use of pregnancy-adjusted NCS dates to compute current retirement benefits is the functional equivalent of continuing to use racially discriminatory salaries as the basis upon which to compute post-Title VII salary increases.

Respondents' pregnancy-adjusted NCS dates constitute an enduring record of past disparate treatment that was made illegal by the PDA. These dates cannot credibly be described as "neutral" because they do not accord equal value to the *actual* service provided by similarly situated employees. Thus, when AT&T used pregnancy-adjusted NCS dates to compute Respondents' length of service for the purpose of determining the size of their pensions, it cannot be said to have made those pension determinations in a "wholly nondiscriminatory way." *Ledbetter*, 127 S. Ct. at 2173 (quoting Justice Brennan in *Bazemore*).

A comparison with the facts at issue in *Ledbetter* confirms the stark difference between the two cases. Lily Ledbetter contended that her salary reflected the effects of long-past, intentionally discriminatory performance evaluations made by individual supervisors (including a key supervisor who had died before trial) within a facially-neutral payment structure. *Ledbetter*,

127 S. Ct. at 2165-66, 2171. Proving her claim would have required a "subtle determination" that discriminatory intent could be inferred from a stale and circumstantial record. *Id.* at 2171. An evaluation of AT&T's policy, by contrast, requires neither subtle determinations nor resort to stale, circumstantial evidence.

Accordingly, it is clear that AT&T's pension benefit determination system is neither facially nondiscriminatory nor neutrally applied, and that AT&T engages in intentional discrimination whenever it uses pregnancy-adjusted NCS dates to determine a retiring employee's pension benefits.

3. Application of the *Bazemore* principles to AT&T's retirement benefit calculation system does not constitute retroactive application of the PDA.

AT&T argues that application of the *Bazemore* principles to its retirement benefit calculation system would give the PDA an impermissible retroactive effect under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Application of a statute is retroactive if it impairs rights a party possessed when it acted, increases a party's "liability for past conduct, or imposes new duties with respect to transactions already completed." *Id.* at 280. None of these conditions obtain here.

First, the Ninth Circuit decision does not impair rights AT&T had when it treated pregnant women differently from similarly situated employees prior to the enactment of the PDA. The legality of AT&T's pre-PDA treatment of pregnant employees is simply not

an issue in this case.[5] After the enactment of the PDA, AT&T quite clearly no longer had a right to treat women affected by pregnancy differently from other employees similar in their ability or inability to work. Therefore, it does not now have a right to pay women affected by pregnancy during the course of their employment lower pension benefits than other employees with identical service histories.

Second, the Ninth Circuit decision did not increase AT&T's liability for conduct that pre-dates the PDA. *Bazemore* does not sanction the awarding of restitution for pre-Act discrimination, and the Ninth Circuit did not impose any in this case.

Third, applying *Bazemore* to AT&T's pension calculation system does not impose new duties with respect to a transaction already completed *at the time the PDA went into effect. Bazemore* established a duty to eliminate *post-Act* disparities created by pre-PDA practices—which is precisely what AT&T did not do.[6]

Finally, it bears noting that nothing mandates AT&T's continued use of a system employing pregnancy-adjusted NCS dates to calculate pension

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[5] *See* n.3, *ante*, at 10.

[6] Because of AT&T's tenacious insistence on perpetuating pre-Act disparities through its pension determination apparatus, it faces liability for "completed" retirement calculations made *after* the enactment of the PDA *and* subject to a timely filed charge. Such liability is the normal consequence of failure to comply with a statutory mandate—it does not constitute retroactive application of the statute.

benefits. JA 56 ¶¶101,104. AT&T easily could have taken steps to avoid any liability for its retirement benefit calculation system. AT&T could have continued to use the system to calculate retirement benefits, without running afoul of Title VII, if it had simply recalculated Respondents' NCS dates to accurately reflect their longevity of service. Alternatively, AT&T could have chosen to employ a different measure of longevity, one that does not re-impose the pre-PDA service credit disparity on present retirement benefit calculations. Or it could have filed a declaratory relief action seeking clarification of its rights and obligations.[7]

What it could *not* do was to choose "mere continuation" of its discriminatory pay structure. *Ledbetter*, 127 S. Ct. at 2173 (citing *Bazemore*).[8]

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[7] AT&T's inaction in the face of uncertainty about its legal obligations contrasts sharply with the aggressive approach of its Midwestern counterpart, described in *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 1991), *cert. denied*, 531 U.S. 1127 (2001). Having adopted an enhanced pension plan in 1994, Ameritech "jumped into court with an action for a declaratory judgment" in defense of its continued use of pregnancy-adjusted NCS dates to compute pension plan eligibility. *Id.* at 816. While treating it as a close question, the Seventh Circuit ruled in Ameritech's favor, creating the circuit conflict that this Court now is called upon to resolve. It was not until 1999 that AT&T (unsuccessfully) sought declaratory relief from the D.C. Circuit. *See AT&T v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001).

[8] AT&T continued to use pregnancy-adjusted NCS dates to compute retirement benefits within the jurisdiction of the Ninth Circuit even after this Court denied certiorari in *Pallas*

(Cont'd)

By making that choice, AT&T commits a *new* act of discrimination *in the present* each time it uses that structure to calculate retirement benefits. Plainly, imposing liability on AT&T for this choice does not constitute retroactive application of the PDA.

CONCLUSION

Twenty years after this Court's decision in *Bazemore v. Friday*, AT&T insists upon its right to discriminate against female employees who took pre-PDA pregnancy leaves when it computes their pensions. Even if AT&T were uncertain of its obligations after the PDA was enacted in 1978, there is no excuse for its failure to discontinue reliance on pregnancy-adjusted NCS dates after *Bazemore* was decided in 1986.

From a public policy perspective, this case vividly illustrates the continuing importance of the *Bazemore* principles as a spur to timely compliance with Title VII mandates. Were this Court to find in favor of AT&T, it not only would deprive these respondents of their right to equal pension benefits; it also would impede Title VII enforcement by creating a perverse incentive toward

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(Cont'd)

v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992). In *Pallas*, the Ninth Circuit held, on virtually identical facts, that AT&T's predecessor-in-interest violated Title VII. The Ninth Circuit *en banc* majority below took note of "AT&T's "truculent refusal" to change its employment practices in the sixteen-year interval following *Pallas*. *See Hulteen v. AT&T Corp.*, 498 F. 3d 1001, 1004 n.1 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2957 (2008); *see also id.* at 1010.

inaction in response to statutory amendments that expand protection against discrimination in the workplace.

For all of the above reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 07-543

IN THE

Supreme Court of the United States

AT&T CORPORATION,
Petitioner,

v.

NOREEN HULTEEN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether AT&T engaged in a current violation of Title VII when it implemented a facially discriminatory seniority system to set retiring workers' pensions.

2. Whether construing Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), to prohibit an employer from relying on pre-PDA service crediting decisions in making post-PDA pension calculations gives the PDA an impermissible retroactive effect.

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INTEREST OF AMICI CURIAE

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace. Pregnancy discrimination and pension inequities are fundamentally at odds with workplace equality. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before this Court.[1] It is joined in filing this brief by 35 organizations that share a longstanding commitment to civil rights and equality in the workplace for all. The individual organizations are described in Appendix A.

STATEMENT OF THE CASE

The individual respondents in this case are four women who were or are long-term employees of AT&T and its subsidiary PT&T who took pregnancy leave between 1968 and 1976. AT&T's policy during that time was to deny full service credit for pregnancy-related leaves even though it gave such credit for other disability leaves.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Respondent Noreen Hulteen was required to begin her leave on November 11, 1968, two months before she gave birth, because her immediate supervisor told her that her "body was not 'hiding' the condition." (Testimony of Noreen Hulteen Before the Senate Judiciary Committee, September 23, 2008, attached hereto as Appendix B (hereinafter "Hulteen Testimony"); J.A. 40 (¶ 25). After her child was born, AT&T required her to also treat leave she needed for unrelated surgery as personal rather than disability leave. J.A. 40 (¶ 26-27). Had her leave been classified as disability leave, Hulteen would have received full or half pay, and her employer would have paid for her medical insurance. Hulteen Testimony; Upon her return to work, she lost 210 days of service credit that she would have received if she had been on disability leave. J.A. 40-41 (¶28).

Respondent Linda Porter was also required to begin her pregnancy leave two months before she gave birth on July 5, 1968. She took only six or seven weeks off following the birth. Porter lost 73 days of service credit that she would have received had she been allowed to work longer and/or had her leave been treated as disability leave. J.A. 44 (¶¶ 48-50).

Respondent Eleanora Collet had two children while working for AT&T's subsidiary, one on September 3, 1974, and one on December 11, 1975. She lost 261 days of service credit because of her two pregnancy leaves. J.A. 42-43 (¶¶ 36-39).

Respondent Elizabeth Snyder's child was born on July 26, 1974. She was not able to return to work

until November 3, 1974 because of medical complications related to her pregnancy. She lost 67 days of service credit that she would have received if her leave had been treated as disability leave. J.A. 45 (¶¶57-59).

After Hulteen, Collet and Snyder retired in 1994, 1998 and 2000 (Porter has not yet retired), J.A. 41-43, 46 (¶¶ 33, 45, 64), AT&T decided to use the service credits it had calculated after they took their pregnancy leave—the leave which the company treated less favorably than leave taken for other disabilities—in setting their pension benefits. It argues that it was not discriminating against the women in doing so because they took their pregnancy leave prior to the effective date of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000(e)(k) (PDA), before which, the company claims, the discrimination was lawful.

The Court of Appeals for the Ninth Circuit, sitting *en banc,* rejected AT&T's argument, re-affirmed its decision in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), that virtually identical conduct was unlawful, and concluded that AT&T violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, when it calculated pensions using a standard that gave less credit for pregnancy leave than for other kinds of leave. 498 F.3d 1001 (2007).

SUMMARY OF ARGUMENT

Pregnancy discrimination is one of the most basic and pervasive forms of sex discrimination faced

by working women. Respondents here have suffered such discrimination twice. First, when they took pregnancy leave they were denied the pay and other benefits that were allowed for all other forms of disability leave. Respondents were subjected to a second round of discrimination when, because of their pregnancy leave, they were awarded lower pension benefits than colleagues who had worked the same amount of time as they had. These discriminatory pension benefits will harm respondents for the rest of their lives.

AT&T seeks to evade liability for the second round of discrimination—the discrimination that is challenged here—by focusing on the technicalities of its pension calculations. Essentially, the company argues that it was "entirely lawful," Petr. Br. at 2, to reduce respondents' service credits when they returned from their pregnancy leave before the PDA. AT&T then asserts that the service credit determinations at those earlier dates made inevitable the reduction in respondents' pensions. But the company made a choice not to re-examine respondents' service credit reductions when it calculated their pensions years later, even though it acknowledges that they were unlawful under the PDA. It should not be allowed to circumvent the law in this fashion.

As an initial matter, AT&T's arguments are flawed because its treatment of respondents when they took their pregnancy leave was not "entirely lawful." In the years following the enactment of Title VII, a growing consensus among courts, state legislatures and the Equal Employment Opportunity

Commission (EEOC) recognized that women who were discriminated against because of pregnancy were subjected to illegal sex discrimination. It was during this time of emerging consensus that respondents took their pregnancy leaves.

Since AT&T's premise for the lawfulness of its pension calculations is not valid, it cannot support the validity of those calculations. Moreover, the challenged conduct in this case is the setting of pensions in 1994 and later, more than sixteen years after any possible doubt about the lawfulness of any form of pregnancy discrimination was ended by the passage of the PDA.

The law is clear that a facially discriminatory seniority system—like that of AT&T—may be challenged when a person is harmed by the application of the system. That is precisely what respondents have done here. They filed timely charges to challenge the current discrimination that is the subject of this case: AT&T's decision to rely on previously calculated service credits in calculating respondents' current pension benefits.

Especially in light of the continued prevalence of pregnancy discrimination in the workplace, it is critical that the laws prohibiting such discrimination be effectively enforced. Through enactment of the PDA, Congress intended to fully eradicate the existence and consequences of pregnancy discrimination. The technical end-run that AT&T attempts to make around the dictates of the law is inconsistent with Congressional intent and should not be permitted. Equal treatment in the workplace

demands no less, and the decision of the Ninth Circuit recognizing these principles should be affirmed.

ARGUMENT

I. AT&T Discriminated Against Respondents Both When They Took Their Pregnancy Leave and When It Set Their Pension Benefits

As Congress recognized in passing the PDA, "discrimination against pregnant women is one of the chief ways in which women's careers have been impeded and women employees treated like second-class employees." Comm. on Labor and Human Resources U.S. Senate, 96th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, at 25 (1980) (Testimony of Rep. Augustus Hawkins) (hereinafter "Legislative History of the PDA"). Accordingly, to be effective, legal protection for women against discrimination in the workplace must encompass a prohibition against pregnancy discrimination.

This commonsense understanding of pregnancy discrimination as a fundamental form of sex discrimination was widely recognized by the federal district courts, the courts of appeals and the EEOC after the passage of Title VII, and was quickly restored by Congress with the passage of the Pregnancy Discrimination Act in 1978 after the Supreme Court's ruling in *Gilbert v. General Electric Co.*, 429 U.S. 125 (1976). Even with this legal protection, discrimination against women when they become pregnant remains one of the most prevalent

forms of employment discrimination, and complaints about pregnancy discrimination are increasing. *See* National Partnership for Women and Families, THE PREGNANCY DISCRIMINATION ACT: WHERE WE STAND THIRTY YEARS LATER 10 (2008) (hereinafter "WHERE WE STAND"). Effective enforcement of Title VII, including its protection against discrimination on the basis of pregnancy, is therefore essential. Employers must not be permitted to penalize women for bearing children or to treat their long-term female employees as second-class citizens in setting their pension benefits.

A. Pregnancy Discrimination Was Pervasive Before And After Title VII Was Enacted

Women's child-bearing capacity has been used for many years to justify their unequal treatment at work. When the Supreme Court upheld a law prohibiting women from being lawyers in 1873, Justice Joseph Bradley explained in his concurring opinion that: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

A century ago, in the landmark case of *Muller v. Oregon*, 208 U.S. 412 (1907), the Court upheld a law establishing maximum hours of work for women, explaining "that women's physical structure and the performance of maternal functions place her at a

disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her." *Id.* at 421.

By the middle of the twentieth century, when the number of women in the workforce was increasing steadily, women were still likely to leave their jobs when they became pregnant. Although some left voluntarily, many left either because they were forced to by their employers or because they knew that it would be only a matter of time before they would be required to leave. Courtni E. Molnar, *Has the Millenium Yet Dawned?: A History of Attitudes Toward Pregnant Workers in America*, 12 MICH. J. GENDER & L. 163, 170 (2005) (hereinafter "*Attitudes Toward Pregnant Workers*").

The stereotype that women could not and should not work when they were pregnant was deeply engrained. During the 1940s, even the Women's Bureau of the Department of Labor, which was intended to advocate for women in the workplace, recommended that women stop working six weeks before their due dates and continue to stay out of work for at least two months after the birth. Women's Bureau, Office of the Secretary, U.S. Dept. of Labor, Bulletin No. 240, *Maternity Protection of Employed Women*, at 7 (1952). Numerous states and employers based their mandatory policies on this and other similar recommendations, with the consequence that women's ability to make their own judgments about when and whether to leave or return to work was essentially eliminated. "Pregnant women were considered unavailable for work for a set period of time before and after

childbirth, whether or not they were willing to work." *Attitudes Toward Pregnant Workers*, at 172.

Many of the discriminatory attitudes toward pregnant women at work derived from a general social discomfort with visibly pregnant women in public places. "Having an obviously pregnant woman present in the workplace caused embarrassment and discomfort for other employees." *Id.* at 171. *See also* Sheila B. Kamerman, Alfred J. Kahn & Paul Kingston, MATERNITY POLICIES AND WORKING WOMEN, at 35 (1983) (hereinafter "MATERNITY POLICIES AND WORKING WOMEN"). One woman who was forced during the 1940s and 1950s to take leave with each of her pregnancies, often well before she wanted or needed to, explained "a lot of women I knew were made to leave as soon as they showed, often in their third month." *Id.* at 2. In a 1962 case, a visibly pregnant waitress was forced to take a leave of absence when her employer told her "that she could not continue working because her appearance was unseemly." *Leach v. Bd. Of Review of Unemployment Comp.*, 184 N.E. 2d 704, 705 (Ohio Ct. C.P. 1962).

Thus, during the decades immediately preceding enactment of Title VII, it was the norm for employers to impose mandatory leave policies that required women to leave work at a certain point in the pregnancy, regardless of the individual woman's interest in remaining at work, her financial need to work, or her ability to do her job. MATERNITY POLICIES AND WORKING WOMEN, at 4. In fact, "prior to the enactment of Title VII of the Civil Rights Act of 1964, most employers discharged a woman as soon

as she became obviously pregnant." Legislative History of the PDA, at 25.

This treatment continued after Title VII was passed, as illustrated by the cases that came before the Court in the 1970s. In Utah, the state unemployment compensation system declared pregnant women ineligible for benefits starting 12 weeks before their due dates and continuing until six weeks after the birth of the child. *Turner v. Department of Employment Security*, 423 U.S. 44, 44 (1975) (striking down the provision as a violation of Fourteenth Amendment due process). The Cleveland, Ohio Board of Education required pregnant school teachers to go on unpaid maternity leave beginning five months before their due dates. *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632, 634 (1974) (striking down the provision as a violation of due process). The Board also prohibited a teacher from returning "until the beginning of the next regular school semester which follows the date when her child attains the age of three months." *Id.* at 635. Moreover, the Board did not guarantee these new mothers re-employment, and it considered failure to comply with the mandatory leave policies a cause for dismissal. *Id.*

AT&T did not have analogous written policies, but two of the respondents here were forced onto maternity leave. In November 1968, two months before the birth of her child, Noreen Hulteen "was told by [her] immediate boss to begin [her] pregnancy Leave of Absence (LOA), as [her] body was not 'hiding' the condition." Hulteen Testimony. Another

respondent, Linda Porter, was also required to begin her leave two months early. J.A. 44 (¶¶ 48-50).

Discrimination against new mothers only exacerbated the harm caused by employers' hostile attitude towards pregnancy. Many new mothers would return to work to find themselves at the bottom of the career ladder, regardless of their previous experience. *See* MATERNITY POLICIES AND WORKING WOMEN, at 35-36. Indeed, it was just such a policy of removing accumulated seniority that this Court confronted and declared unlawful in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). When Nora Satty returned to work after her pregnancy leave, pursuant to company policy she had lost all of her seniority rights. *Id.* at 139. She was given a temporary position at a lower salary, and unsuccessfully bid on three permanent positions. *Id.* In each case, Satty would have been awarded the job if she had not lost her accumulated seniority. *Id.*

As shown by this history, one of the most obvious forms of workplace discrimination that women faced both before and after Title VII was passed was discrimination based on their capacity to bear children and their status as pregnant women and mothers.[2] "The fact that women bear children and

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[2] The legislative history of Title VII includes no discussion about the scope of the sex discrimination that was prohibited. The bill originally proposed did not include "sex"; the category was added on the floor of the House at the end of the deliberations by Representative Howard Smith of Virginia, who apparently hoped it would be sufficiently controversial that it would derail the entire bill. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE

men do not has been the major impediment to women becoming fully integrated into the public world of the workplace." Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1119 (1986). Testifying before Congress in 1977, one scholar observed that:

> At the very core of the stereotypes which have resulted in irrational impediments to employment opportunity for women are assumptions about pregnancy—both its medical characteristics and physical effects, and, more broadly, assumptions about its implications for the role of women in society and in the labor force. Indeed, it is fair to say that most of the disadvantages imposed on women, in the work force and elsewhere, derive from this central reality of the capacity of women to become pregnant and the real and supposed implications of this reality.

Wendy W. Williams, associate professor, Georgetown University Law Center, Testimony, U.S. Senate, Subcommittee on Labor or the Committee on Human Resources, *Discrimination on the Basis of Pregnancy*, (1977) (Report of Hearings) (Washington, D.C.: GPO, 1977), at 123. As Justice Stevens recognized in his dissenting opinion in *Gilbert*, "it is the capacity to become pregnant which primarily differentiates the female from the male." 429 U.S. at 162.

L. J. 1281, 1283-84 (1991). Instead, the law passed, and sex discrimination became illegal.

B. Pregnancy Discrimination Was Widely Considered to Violate Title VII When Respondents Took Their Pregnancy Leave

Congressional action, court decisions, and guidance from the Equal Employment Opportunity Commission all informed employers by the early 1970s that sex discrimination was a problem to be given serious attention, and that pregnancy discrimination was most certainly part of that ill.

In 1972, when Congress amended Title VII to extend its coverage to government employees, it also made a strong statement that "discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." H.R. REP. NO. 92-238, at 5 (1971). Both the House and the Senate reports commended the efforts of the EEOC and noted that many people still viewed sex discrimination as "morally and physiologically justifiable." *Id.*; S. REP. NO. 92-415, at 8 (1971).

Close on the heels of this congressional affirmation of the EEOC's importance, the Commission issued guidelines stating clearly that discrimination based on pregnancy or related conditions was sex discrimination. The EEOC guidelines, the agency's formal statement on the issue, provided that:

> [d]isabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies . . . formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

29 C.F.R. § 1604.10 (1973).

All seven federal circuit courts that considered pregnancy discrimination claims under Title VII in the early 1970s understood that pregnancy discrimination was sex discrimination. By the time of the PDA's enactment, eighteen district court opinions had concluded that pregnancy discrimination claims were encompassed by the prohibition against sex discrimination. See H.R. REP. NO. 95-948, at 2 (1978). There was only one district court that reached a different conclusion. *See* Brief of the Center for Reproductive Rights as *Amicus Curiae* in Support of Respondent at 6 n.1 (collecting cases).

These decisions, from around the country, found many different forms of pregnancy discrimination to violate Title VII. For example, courts found violations of federal law when employers forced women to take mandatory pregnancy leave. *See,*

e.g., Singer v. Mahoning County Bd. Of Mental Retardation, 379 F.Supp. 986 (N.D. Ohio 1974), *aff'd*, 519 F.2d 748 (6th Cir. 1975). Employees who were fired when they became pregnant successfully challenged their terminations under Title VII. *See, e.g., Jacobs v. Martin Sweets Co.*, 550 F.2d 364 (6th Cir. 1977); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975). Denial of sick leave benefits to pregnant women was also found to violate the law. *EEOC v. Children's Hosp.* 415 F.Supp. 1345 (W.D. Pa. 1976); *Hutchison v. Lake Oswego School Dist.*, 519 F.2d 961 (9th Cir. 1975). Similarly, denial of regularly available disability leave for women temporarily out of work in connection with a pregnancy was found to be illegal. *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975). In all of the foregoing decisions, the courts assumed, generally without much discussion, that pregnancy discrimination was sex discrimination that was prohibited under Title VII.

In addition, by the 1970s, 25 states interpreted their fair employment practices laws to prohibit discrimination based on pregnancy and related conditions. Many states did so even though the particular state law, like Title VII at the time, did not specifically mention pregnancy. *See* S. REP. NO. 95-331, at 3 (1977).

Thus, by the early 1970s, state and federal courts around the country, as well as the EEOC, recognized that discrimination on the basis of pregnancy was unlawful sex discrimination. As Congress understood in considering the PDA, "[t]he assumption that women will become pregnant and

leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs." H.R. REP. 95-948 at 3. Given that this stereotyping was central to the discrimination women faced in the workplace, "failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment." S. REP. 95-331, at 3.

It was against this legal backdrop, in which policymakers and courts around the country were developing a consensus understanding that pregnancy discrimination was a central aspect of sex discrimination against working women, that AT&T maintained its policy of treating pregnancy leave less favorably as "personal" leave, rather than as "disability" leave. As a result, when respondents returned from their mostly unpaid pregnancy leave in the late 1960's and the 1970's, the company recalculated their service credits to give them less accumulated seniority.

In 1976, when the Supreme Court examined the question of how to treat pregnancy discrimination under Title VII, it opted for a formalistic interpretation of the term "sex" that ignored the realities faced by working women. In *Gilbert*, the Court concluded that discrimination on the basis of pregnancy through the denial of pregnancy-related disability benefits was not sex discrimination. 429 U.S. at 145-46.

The congressional response to *Gilbert* was swift and direct: within just three months, legislation was proposed that would not only correct the Supreme Court's specific holding in that case, but also its formalistic approach to assessing whether employer conduct is illegal discrimination. *See, e.g.*, H.R. REP. 95-948, at 2, 4; *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983). The PDA was enacted not long after, in 1978.

Moreover, just a year after deciding *Gilbert*, this Court narrowed its scope with its decision in *Satty*. In *Satty*, it concluded that a policy that denied accumulated seniority to women who were absent from work because of childbirth was unlawful because it had a disparate impact on women. 434 U.S. at 139. *Satty* distinguished *Gilbert* on the ground that the denial of accumulated seniority imposed a burden on women not felt by men, while the limitation on disability coverage at issue in *Gilbert* simply declined to offer to women a benefit that it did not and could not offer to men. *Id.* at 142.

C. Respondents Have Properly Challenged AT&T's Unlawful Setting of Their Pension Benefits

AT&T's argument to the Court rests on the premise that its reduction in respondents' pension benefits many years later was permissible because pregnancy discrimination was "entirely lawful" at the time respondents went on leave. But that premise does not hold up in light of the consensus that had developed before 1976 and the decision in

Satty. As discussed in Respondents' Brief, AT&T's policy of denying women on pregnancy leave the right to accumulate seniority is controlled by, and was prohibited by, the Court's decision in *Satty*. Resp. Br. at 45-46.

Even if AT&T is correct that its conduct fell under *Gilbert*, not *Satty*, then only for a very brief period—from December 1976, after *Gilbert* was decided, until the PDA's reversal of that decision went into full effect in April 1979—could AT&T's treatment of respondents even arguably have been considered to be lawful. None of the respondents here took their leave during that time.

Many years after the PDA, it is disingenuous for AT&T to claim that it should be allowed to discriminate in calculating respondents' pensions, because all it was doing was continuing its earlier "entirely lawful" treatment of them. Not only was the conduct not lawful at the time respondents took their pregnancy leave, it was not, as a separate matter, lawful to rely on service credit calculations that incorporated discrimination in setting pension benefits in 1994 and later. AT&T's conduct is particularly troubling in light of the Ninth Circuit's 1991 *Pallas* decision, which specifically disallowed the arguments that the company relied on in calculating respondents' pensions. *Pallas*, 940 F.2d at 1327.

AT&T contends that respondents should have challenged their reduced service credits when they were first notified about them after they returned from their leave. However, there is no evidence in

the record that the company's running service-credit tally, which was always subject to revision, had a concrete adverse impact at that time.[3] Indeed, had respondents filed a complaint when their credits were reduced, AT&T would undoubtedly have responded that any harm was merely speculative. It was only years later, when AT&T calculated the respondents' pensions to be lower than those of men who had worked the same amount of time as they had but had been credited for their disability leave, that the respondents' claims were triggered.

Moreover, even if respondents could have complained at an earlier point, they were not required to do so. Title VII gives those injured by facially discriminatory seniority systems, like the one applied in calculating respondents' pensions, more than a single opportunity to pursue a claim for the harm caused by the discriminatory system. *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912 n.5 (1989). To eliminate any doubt about when such a claim of discrimination must be made, and to overrule another aspect of the decision in *Lorance*, Congress provided in the Civil Rights Act of 1991 that an employee may challenge a discriminatory seniority system at three distinct points: 1) when it is adopted, 2) when the individual becomes subject to the system, or 3) when the individual is injured by application of the system. *See* 42 U.S.C. 2000e-5(e)(2). As explained in Respondents' Brief, Congress gave employees these choices to protect workers from discrimination and ensure that they would receive

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[3] There may be circumstances in which the setting of service credits could be an unfair employment practice. However, there is no evidence that this was the case here.

equal treatment if they did not complain until the discriminatory application of the system had an actual impact. Resp. Br. at 23.

D. The Continued Prevalence of Pregnancy Discrimination Makes Strong Enforcement of Title VII Essential

Data collected by the EEOC demonstrates that pregnancy discrimination is still very much a barrier to women's full equal employment opportunity. Between 1997 and 2007, the number of complaints of pregnancy discrimination filed with the agency increased by 65 percent. See Equal Employment Opportunity Commission, Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY1997–FY2007 (last modified on February 26, 2008), at http://www.eeoc.gov/stats/ pregnanc.html.

Recent pregnancy discrimination cases reveal that the stereotypes about women's abilities and proper roles have not changed much since the 1970s. Too often, acts of discrimination "seem to be fueled by a fundamental resistance to having pregnant women in the workplace, or having to accommodate the needs of pregnant women." WHERE WE STAND, at 10. Thus, employers continue to engage in blatant discrimination. For example, in 2007, the EEOC settled a suit with a maternity clothing specialty store after challenging the store's policy not to hire pregnant job applicants. Equal Employment Opportunity Commission, Maternity Store Giant to Pay $375,000 to Settle EEOC Pregnancy Discrimination and Retaliation Lawsuit (January 8, 2007), at http://www.eeoc.gov/press/1-8-07.html.

Discriminatory application of leave policies also continues, even three decades after the passage of the PDA. Thus, female police officers in Albuquerque, New Mexico have been seeking equal treatment of their pregnancy-related leave since 2000, and litigation over the city's policies continues to this day. *See Orr v. Albuquerque*, 531 F.3d 1210, 1212-1213 (10th Cir. 2008).

Research into attitudes about pregnant women provides further evidence of the continued pervasiveness of the stereotypes fueling discrimination against pregnant women. Studies have shown, for example, that pregnant women are viewed more negatively by male colleagues than non-pregnant women. *See, e.g.*, Jane A. Halpert, Midge L. Wilson & Julia L. Hickman, *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. OF ORGANIZATIONAL BEHAV. 649 (Dec. 1993). In one study "using pregnant (wearing a prosthesis) and non-pregnant testers, researchers found that pregnant women encountered more hostility when applying for jobs, particularly jobs in non-traditional fields." WHERE WE STAND, at 10. These studies and many others confirm that the treatment pregnant women face at work stems in large part from continued stereotyping and bias.

In light of the persistence of pregnancy discrimination, it is critical that Title VII, as amended by the PDA, be rigorously enforced to eliminate the myriad harms that this discrimination imposes on women. While much of the discrimination that pregnant women face occurs while they are still active in the workforce,

respondents here confront a form of pregnancy discrimination that emerged at the end of their careers. The calculation of pension benefits with a penalty for pregnancy-related leave is a form of discrimination that devalues women's role in the workplace and causes harm for the rest of a woman's life.

II. Pension Discrimination Has Serious Consequences for Women

When employers calculate pension benefits with a built-in penalty for periods of pregnancy-related leave, as AT&T did for respondents, those employers are discriminating on the basis of sex. Contrary to AT&T's argument, its present-day sex discrimination in calculation of pension benefits cannot be justified on the ground that its pregnancy-related leave discounting policy was not unlawful before the PDA. As described above, the notion that pregnancy discrimination was not sex discrimination in violation of Title VII had no legal support when respondent employees took their pregnancy leaves between 1968 and 1976. Thus, the decisions AT&T made at that time cannot be considered "entirely lawful when made," Petr. Br. at 2, and cannot justify discriminatory pensions.

Moreover, even accepting the argument that AT&T's pregnancy leave policy did not violate Title VII prior to 1979, the company unquestionably violated the law in and after 1994 when it calculated pensions to provide lesser benefits for women who had taken leave for pregnancy before the enactment

of the PDA. That decision about calculation of retirement benefits treated women who had worked for the company for years and were now entering retirement differently than men in the same position. Women like the respondents here had already faced discrimination because of pregnancy; AT&T's pension calculation discriminated against them yet again. Retired women continue to suffer the consequences of many forms of employment discrimination. The burdens they face should not be increased by a second round of discrimination when their pensions are set.

A. Women Live Longer And Have Fewer Retirement Resources Than Men

While economic security in retirement is fundamental to health and well-being, retired women live with fewer resources and significantly more uncertainty than their male counterparts. It is well-established that women, on average, live five to 10 years longer than men, and therefore need their financial resources to last considerably longer. *See, e.g.*, Cindy Hounsell, *The Female Factor 2008: Why Women Are at Greater Financial Risk in Retirement and How Annuities Can Help*, at 9 (2008). Unfortunately, however, women over 65 generally have less, rather than more, retirement income. Women draw lower Social Security benefits and receive less from employer-based retirement plans.

Among those who do receive pension income, women's benefits are significantly lower than men's benefits. Richard Johnson, *The Gender Gap in Pension Wealth: Is Women's Progress in the Labor*

Market Equalizing Retirement Benefits?, Urban Institute Brief Series No. 1 (March 1999). The most recent population surveys show that the median pension benefit for women over 65 is $8,110, compared to a $12,505 median for men in the same age range. U.S. Census Bureau, Current Population Survey, http://pubdb3.census.gov/macro/032008/pov/new01_100_01.htm (hereinafter "Current Population Survey").

Because women are paid less and take more time off for family responsibilities over the course of their careers, women's lifetime earnings lag substantially behind those of their male counterparts. Consequently, women in retirement generally receive significantly less in Social Security benefits than do their male counterparts. Moreover, they are less likely to have any pension at all, and the pensions they do receive are likely to be lower. Thus, women are more likely than men to rely on Social Security benefits as a primary source of retirement income. *See* Judith G. Gonyea & Nancy R. Hooyman, *Reducing Poverty Among Older Women: Social Security Reform and Gender Equity*, 86 FAMILIES IN SOCIETY: J. CONTEMP. HUM. SERVICE 338, 340 (2005).

In part as a consequence of the pension differential and lower Social Security benefits, "[w]omen are at a much greater risk of falling into poverty in later life than men." *Id.* at 339. In fact, the poverty rates for women over 65 are nearly double those of men the same age. About 6.6 percent of older men currently live in poverty compared to 12

percent of older women. *See* Current Population Survey.

B. Disparities In Retirement Income Exacerbate The Harm Women Suffer From Pay Discrimination

The discrimination suffered by respondents here is only one aspect of the continuing pay discrimination that causes women's salaries to be lower over their lifetimes than the salaries of similarly situated men. Pension discrimination exacerbates the harm caused by a lifetime of pay discrimination.

The gender-based wage gap in the United States is persistent and well-documented. Current estimates of the gender wage gap place it at about eighty percent—meaning that a woman working full-time, year-round, on average, earns 78 cents for every dollar earned by a man. *See* Carmen Denavas-Walt, Bernadette D. Proctor and Jessica C. Smith, U.S. Census Bureau, Current Population Reports, P60-235, *Income, Poverty and Health Insurance Coverage in the United States: 2007*, at 6 (U.S. Gov't Printing Office 2008). The pay gap is especially pronounced for African American women and Hispanic or Latino women, who earn even less on the dollar compared to white men. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Highlights of Women's Earnings in 2007*, at 1 (Oct. 2008) (reporting median usual weekly earnings of $788 for white men, $626 for white women, $533 for black or African American women, and $473 for Hispanic or

Latino women).

The gender wage gap exists at every level of earnings. *Id.* Moreover, the disparity in men's and women's wages extends, with some variation, throughout the employment lifecycle. Women in their 40s and 50s earn salaries more disparate from their male counterparts than do women at the beginning of their careers. *See id.* at 8; Francine D. Blau *et al.*, THE ECONOMICS OF WOMEN, MEN, AND WORK 150 (5th ed. 2006) ("women earn less than men in all age categories," and the ratio of women's earnings to men's decreases as they age). When earnings over a longer period of time are aggregated, the gap is even starker. In their prime earning years, women earn only 38 percent of what men earn over a 15-year period. *See* Stephen J. Rose & Heidi I. Hartmann, Inst. for Women's Pol'y Res., STILL A MAN'S LABOR MARKET: THE LONG-TERM EARNINGS GAP 9 (2004).

Thus, by the time a woman's pension is calculated at the end of her work life, the accumulated years of pay disparities will significantly affect the resources she has to live on in retirement, as compared to those available to a male counterpart. The fact that women are more likely to take leave during the course of their careers to care for children or other family members only adds to this difference. Requiring women to take more leave than they themselves would have chosen, as was the case for Noreen Hulteen and Linda Porter, exacerbates the differences even further. And when companies like AT&T choose in the present day to treat pregnancy-related leave as less worthy of inclusion than other

disability leave in calculating benefits, they worsen the difficult circumstances of many female retirees. This is unlawful sex discrimination that older women will live with for the rest of their lives, and it should not be permitted.

CONCLUSION

This Court should affirm the Ninth Circuit and ensure that employers cannot discriminate on the basis of pregnancy-related circumstances in calculating the pension benefits that female employees will receive in their retirement.

Respectfully submitted,

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APPENDIX

APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

Founded in 1915, the *American Association of University Professors* (AAUP) is an association of over 45,000 faculty members and other academic professionals in all academic disciplines. The AAUP has taken a strong stand against discrimination by institutions of higher education. *See, e.g.*, On Discrimination, POLICY DOCUMENTS & REPORTS 299 (10th ed. 2006). The AAUP has joined *amicus* briefs in several recent Supreme Court cases addressing anti-discrimination legislation, including *Crawford v. Metropolitan Government of Nashville and Davidson County* and *Engquist v. Oregon Department of Agriculture*. The AAUP is particularly concerned about discrimination against pregnant women, both in the academy and society at large. The AAUP's *Statement of Principles on Family Responsibilities and Academic Work*, issued in 2001, notes that pregnancy is an "event that interrupts the career of a higher percentage of professors than any other 'physical disability' or family obligation." POLICY DOCUMENTS & REPORTS 299 (10th ed. 2006) at 219-221. The *Statement* accordingly calls for the adoption of policies that "support[] family life" because "[w]ithout such support, the commitment to gender equity, for both women and men, will be seriously compromised."

For more than 125 years, the *American Association of University Women* (AAUW), an organization of over 100,000 members and 1,300

branches nationwide, has worked to break through educational and economic barriers so that all women have a fair chance. AAUW's 2007-09 member-adopted Public Policy Program states that AAUW is committed to supporting fairness in compensation and vigorous enforcement of employment antidiscrimination statutes. AAUW believes that pay equity is a simple matter of justice and continues to support initiatives that seek to close the persistent and sizable wage gap between men and women; appropriate application and enforcement of the Pregnancy Discrimination Act are crucial to these efforts. AAUW strongly believes that women's pensions should not be tainted by the discriminatory policies of the past, and that women should not in effect be punished because of their parental status.

The *American Nurses Association* (ANA) was founded over a century ago, and today it represents the interests of the Nation's 2.9 million registered nurses. The ANA is comprised of 54 constituent member associations, including one in every state of the United States. ANA has approximately 200,000 members. In addition, there are 21 specialty nursing organizations that are Organizational Affiliates of the ANA and that have a combined, additional membership of approximately 210,000 RNs. ANA not only develops the Code of Ethics for Nurses and the standards of nursing practice, it actively promotes patient safety, workplace rights, appropriate staffing, workplace and environmental health and safety, and the public health. The profession of nursing is a predominantly female profession, and as such, ANA's membership and the interests of all nurses for whom it speaks are directly affected by the

issues raised in this case. Further, ANA promotes the public health and supports women who take needed time during pregnancy and after child-birth to attend to their own health needs and those of their children. Mothers who take leave because of their commitment to health should not suffer from discriminatory employment policies. Lastly and quite fundamentally, ANA supports equal treatment under the law.

Business and Professional Women/USA (BPW/USA), founded in 1919, is a multi-generational, nonpartisan membership organization with a mission to achieve equity for all women in the workplace through advocacy, education, and information. Established as the first organization to focus on issues of workingwomen, BPW/USA is historically a leader in grassroots activism, policy influence and advocacy for millions of workingwomen. With members in every Congressional district and all 50 states and 4 U.S. territories, BPW/USA has become the leading advocate for millions of workingwomen on work-life effectiveness and workplace equity issues.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, the California Women's Law Center works in the following priority areas: Sex Discrimination, Women's Health, Race and Gender, Women's Economic Security, Exploitation of Women and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination in employment. CWLC has

authored numerous amicus briefs, articles, and legal education materials on this issue. The AT&T v. Hulteen case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in this case.

The *Clearinghouse on Women's Issues* provides information on issues relating to women, including discrimination on the basis of gender, age, ethnicity, marital status or sexual orientation with particular emphasis on public policies that affect the economic, educational, health and legal status of women.

The Coalition of Labor Union Women (CLUW) is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. Since 1974, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its more than 80 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as *amicus curiae* in numerous legal cases involving issues of gender discrimination and pay equity. CLUW provides training and

educational support to its members on issues relating to Title VII enforcement and prevention of workplace harassment and discrimination, including discrimination based on pregnancy.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since 1973, CWEALF has provided legal education and advocacy and conducted public policy work to ensure the enforcement of Title VII.

The *D.C. Employment Justice Center* (EJC) is a private, non-profit organization that advocates for the rights of frequently unprotected and vulnerable populations, specifically minority workers, domestic violence victims, immigrant workers, and other similarly vulnerable working populations through our legal services, advocacy, and education work. The EJC has achieved many legislative victories that have reformed the workers' compensation and unemployment compensation systems in the District, educated thousands of workers about their rights on the job, and built a vibrant community organizing program.

The *Feminist Majority Foundation* (the Foundation), is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. The Foundation is dedicated to eliminating sex

discrimination and to the promotion of women's equality and empowerment. The Foundation's programs focus on advancing the legal, social, economic, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs.

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah strongly supports stricter enforcement of pay equity laws, improvements in restrictive pension policies, and support for measures that will reduce the wage gap and bring about real economic security for women.

Legal Momentum (formerly NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. Throughout its nearly forty-year history, as lead counsel and as *amicus curiae*, Legal Momentum has worked to enforce the laws prohibiting sex discrimination on the job so as to assure women's equality and economic security. Giving full effect to those laws

demands that past discriminatory acts not give rise to present-day discrimination with respect to any term or condition of employment, including pension benefits.

Myra Sadker Foundation is a non-profit organization dedicated to promoting equity in and beyond schools. Myra Sadker, educator, author, and Dean at American University, exposed both the subtle and blatant education biases that limit the academic, psychological, economic, and physical potential of both males and females. The foundation supports research, training and special programs to assist teachers, parents, children and other adults in eliminating such biases from America's schools.

Founded in 1996, the *National Asian Pacific American Women's Forum* (NAPAWF) is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American women and girls. The economic empowerment of all women is one of the central issues that forms the basis of NAPAWF's advocacy. NAPAWF supports the respondents in this case because the persistence of pregnancy discrimination prevents women from achieving equality and economic security in the workplace.

Established in 1955, the *National Association of Social Workers* (NASW) is the largest association of professional social workers in the world, with approximately 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. With the purpose of developing and

disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics,* conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. The NASW Code of Ethics directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" . . . and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of . . . sex." NASW policies support "breaking the...'maternal wall' that affects mothers in the paid labor force..." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Women's Issues*, SOCIAL WORK SPEAKS, 387, 390 (2006). Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

The *National Association of Women Lawyers* (NAWL), founded in 1899, is the oldest women's bar association in the country. NAWL is a national

voluntary organization with members in all fifty states, devoted to the interests of women lawyers, as well as all women. Through its members, committees and the Women's Law Journal, it provides a collective voice in the bar, courts, Congress and the workplace. NAWL stands committed to ensuring equality in the workplace.

The *National Council of Jewish Women* (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work to ensure that "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation or gender identity must be eliminated." In addition, NCJW believes "equal rights and equal opportunities for women must be guaranteed." Consistent with our Resolutions, NCJW joins this brief.

The *National Council of Women's Organizations* (NCWO) is a coalition of over 200 of the nation's largest and most influential women's groups. Representing 10 million women nationwide, NCWO groups support full enforcement of laws that prohibit sex discrimination in employment. NCWO groups recognize the long-term effects that pregnancy discrimination has on women's economic security.

The *National Education Association* (NEA) is a nationwide employee organization with approximately 3.2 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to ending gender discrimination by educational institutions and, to this end, firmly supports the vigorous enforcement of the Pregnancy Discrimination Act.

The *National Organization for Women* (NOW) is the largest feminist organization in the United States, with a contributing membership of over 500,000 women and men in more than 400 chapters in all 50 states and the District of Columbia. Since its inception in 1966, a major goal of NOW has been to achieve equal employment opportunity for women, including the eradication of discrimination. In furtherance of that goal, NOW has participated in numerous legal cases and in drafting related legislation. The Pregnancy Discrimination Act was drafted by a NOW Founder, Phineas Indritz, and NOW was active in promoting its passage. NOW has a strong interest in the fair treatment of women in retirement and pensions, and in the elimination of pregnancy discrimination and all of its vestiges.

The *National Partnership for Women & Families* is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious

workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

National Women's Political Caucus (NWPC) is a bipartisan, multicultural grassroots organization dedicated to increasing women's participation in the political field and creating a political power base designed to achieve equality for all women. Founded in 1971, NWPC prides itself on increasing the number of pro-choice women elected and appointed into office every year. Through recruiting, training and financial donations, NWPC provides support to women candidates running for all levels of office regardless of political affiliation. In addition, hundreds of state and local chapters reach out to women in communities across the country to better assist them in their dreams of being elected into office. NWPC strives to break the glass ceiling, which restricts a woman's ability to climb the political ladder, one crack at a time.

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by pay disparities, sex discrimination including pregnancy discrimination, the long-term negative effects on economic well-being of these disparities and discrimination, and the difficulties of seeking and achieving redress for all these issues. Our toll-free Job Survival Hotline fields thousands of phone calls annually from women

facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and our work to promote policies that aid women in their efforts to achieve economic self-sufficiency. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

The *Northwest Women's Law Center* (NWWLC) is a non-profit public interest legal organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, the NWWLC has been dedicated to protecting and securing equal rights for women and their families, including in the workplace, in educational institutions, and elsewhere. Toward that end, the NWWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, including serving as *amicus* in a recent Washington case confirming that pregnancy discrimination is sex discrimination, and in numerous other cases establishing women's rights to work free from sex discrimination and sexual harassment. The Law Center is currently involved in numerous other legislative and litigation efforts to protect equal opportunity in the workplace and continues to serve as a regional expert and leading advocate on women's legal rights.

The *Older Women's League* (OWL) is a non-profit, non-partisan organization that accomplishes its work through research, education, and advocacy

activities conducted through its chapter and at-large membership network. Now in its 28th year, OWL provides a strong and effective voice for more than 70 million women in America, age 40 and over. OWL has long advocated for equality and economic security, therefore we believe that all persons should be free from sex discrimination in the workplace. No one should be faced with discrimination for becoming pregnant. This type of discrimination has gone on for too long. It affects women at each step of their lives, resulting in older women living in poverty at a much higher rate than older men. OWL believes that AT&T's conduct is contrary to the purpose of Title VII and must not be allowed.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting people living in poverty. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women's employment and economic security. Discriminatory workplace policies and practices have a negative impact on women's immediate and long-term economic security. The poverty rate among women 65 and older is 12 percent, more than 80 percent higher than the poverty rate for men 65 and older (6.6 percent). Non-discrimination in employment is the surest path out of poverty and toward economic well-being. The Shriver Center has a strong interest

in the eradication of unfair and unjust employment policies and practices, including discriminatory pension benefits, which serve as a barrier to economic equity.

Sociologists for Women in Society (SWS) is a non-profit scientific and educational organization of sociologists and others dedicated to maximizing the effectiveness of and professional opportunities for women in sociology; exploring the contributions which sociology can, does and should make to the investigation of and humanization of current gender arrangements; and improving women's lives and creating feminist social change. It is with the aim of improving women's lives that we sign on to this brief that addresses issues of discrimination around pension benefits.

The *Southwest Women's Law Center* is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws in the workplace.

Women Employed 's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to

training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly opposes discrimination against women employees while on maternity leave, as well as compounding that discrimination by reducing their pension benefits based on the initial discriminatory action.

Women Work! The National Network for Women's Employment is the nation's largest network of programs that help women enter, re-enter, and advance in the workforce. The service providers who are our members and the women they serve frequently encounter sex and pregnancy discrimination and know first-hand how detrimental these practices are to women's ability to support themselves and their families. *AT&T v. Hulteen* is a test of women's right to be fairly compensated – in wages and in pension benefits – for the equal work they perform. Pregnancy discrimination is a barrier that continues to prevent women from achieving true equality in the workforce.

The *Women's Bar Association of the District of Columbia* (WBA-DC), founded in 1917, works to advance and protect the interests of women lawyers; to maintain the honor and integrity of the legal profession, and to promote the administration of justice. Among its many activities, WBA-DC develops and promotes the interests of women by monitoring

legislation and filing amicus briefs on issues vital to women. WBA-DC has an interest in protecting the legal rights of women, both within and outside of the legal profession, under Title VII of the Civil Rights Act of 1964 Therefore, WBA-DC files as an amicus in this matter in the interest of protecting the rights of women to equality in the workplace.

The *Women's Law Center of Maryland, Inc.* is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and insure gender equality in the workplace.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

Women's Research & Education Institute (WREI) has provided timely, nonpartisan data and issue analysis to the women of the U.S. Senate and House of Representatives since 1977. Every other year, WREI produces a detailed demographic profile of women's status as students, workers, voters, taxpayers, wives, mothers, widows, and retirees. This book focuses on education, employment, health, military participation, economic well-being, and family formation.

The *YWCA USA* is the nation's oldest women's organization. We represent more than two million women and girls, and can be found in many communities across the United States. With nearly 300 local associations, we serve thousands of women, girls, and their families annually through a variety of programs and services, including housing and nutrition programs, education and training services, violence prevention and recovery programs, and more. Our clients include elderly women, disabled women, women and girls escaping violence, and low-income and homeless women and their families. Throughout its 150 year history, the YWCA has been in the forefront of most major movements in the United States as a pioneer in race relations, labor union representation, and the empowerment of women.

APPENDIX B

TESTIMONY OF NOREEN HULTEEN BEFORE THE SENATE JUDICIARY COMMITTEE SEPTEMBER 23, 2008

In 1968, I was pregnant with my youngest child. I was employed by Pacific Telephone and Telegraph, a wholly was owned AT&T subsidiary, as an Assistant Manager.

In November, I was told by my immediate boss to begin my pregnancy Leave of Absence (LOA), as my body was not "hiding" the condition. At the time, a pregnancy leave was treated as unpaid personal leave by the company. My daughter was born on 1/12/69.

AT&T at that time required a doctor's certificate of fitness be provided before any employee could return to work following a pregnancy LOA.

My doctor told me that corrective surgery was needed before he could give me that document. A full laperotomy was required and it was scheduled for 6 weeks after the birth of my child. The surgery was not pregnancy related. Because I was on a "personal leave" for pregnancy and not a disability leave, the time I took off for the laperotomy was not considered by AT&T to be a disability LOA.

Recovery was long. I returned to work in either July or August 1969. If I had been male, I would have been absent on Disability Benefits for surgery. However, because I was on a personal leave, I could not take off additional time for the laperotomy as a

disability leave unless I returned to work first. I asked my supervisor if I could return for one day and then begin a disability leave. My employer refused this request and, as I stated above, my doctor would not authorize me to return to work without the surgery. If I had been on disability leave and not pregnancy leave, my medical insurance would have been paid in full by the company. If I had been on a disability LOA, I had enough service then to have my full salary paid for part of the time and I would have received half-pay for the remaining time. I had to pay for my own medical insurance for all the months I was on LOA. Due to the AT&T requirement that a person work 6 months after return from a personal LOA before becoming eligible for paid vacation, I lost my vacation benefit for 1969. I also lost my annual raise in pay.

Because AT&T treated pregnancy leave differently from any other kind of disability leave, I lost all of those benefits.

Upon my return to work, my Net Credited Service (NCS) date was adjusted to deduct all but 30 days of the time I had been out on leave. If I had been out on disability leave, I would not have had my date adjusted. AT&T uses this date to keep track of how long someone has worked at the company for seniority and other purposes. This made no difference to anything at that time. It was just a paper record.

Later on, I read that Pacific Bell had been sued successfully for discriminating in pension calculations against women who took pregnancy

leave by deducting that leave time from their NCS dates when it did not deduct that time for any other kind of disability leave. I asked my immediate boss to adjust my NCS date back to my original NCS date as required by the court ruling. He told me that I must write to the Benefits Committee for that.

I wrote the letter on my personal stationery and received no reply. I sent a second letter asking for a reply and received none. In June 1994, my early-retirement date (a force reduction) arrived without any disposition on my request. I signed the papers agreeing to the conditions, but noted "except my NCS date" in the margin, and signed that.

When AT&T calculated my pension, it reduced my annual pension benefit because of the pregnancy leave I had taken. I had actually worked for AT&T for 30 years and 8 months. I was credited with less than 30 years. A man hired on the same day as me, and retired on the same day as me, could have had several disabilities, and yet would retire with higher pension benefits than me. This is what I sued to have AT&T fix.

I waited some time for AT&T's response, but still received none. So, I made an appointment with the EEOC in San Francisco. My first communication there was difficult. The first contact rejected my complaint. Only after complaining was I finally connected to a supervisor who was helpful and understanding.

Eventually, I was issued a "Right To Sue" letter. I was referred to Judith Kurtz, the attorney on the

Pallas case. We met and reached an agreement that I would be a named plaintiff in a class action suit. My case is currently before the Supreme Court.

About two years later, AT&T offered me $5,000 cash to drop the case. By then, I was aware of a number of women whose loss was probably greater than mine was and whose need was more urgent. I refused to settle and let the other women down. I also felt strongly that AT&T was obligated to obey the law.

For the 14 years since I retired and attempted to have my lost credit reinstated, AT&T has employed many delaying tactics. My understanding is that they claim that they are not responsible for correcting that which happened before the law was changed. I am not claiming damages for any of the harm done to me in 1969, before the Pregnancy Discrimination Act. I am not asking AT&T to pay the medical insurance or lost disability pay they should have paid me, or to reimburse me for the raise or the vacation time I lost. I am claiming correction of the harm that was done to me in 1994 – after the law was changed. I am sure that during the 14 years of litigation, many AT&T pensioners who should have been entitled to fair treatment have died and can never benefit from this lawsuit.

I was very happy when the Ninth Circuit agreed with us in my case and held that AT&T was not allowed to reduce pensions for women who took pregnancy leave in the past. I was disappointed that rather than finally deciding to do the right thing and stop discriminating, AT&T decided to try to get the Ninth Circuit's decision reversed.

In my opinion, the problem is not in the laws, which exist to protect women. The problem is that they are not enforced properly. When my deposition was taken as part of the lawsuit, the AT&T lawyer asked why I had not filed a complaint in 1969. She was very young and did not understand that there was no way to complain in 1969. If I had complained to AT&T, my belief is that I would have been fired. Today, women still hesitate to start a proceeding like this because it is apparent that large corporations can flaunt the laws and not be challenged.

I am hopeful that the Supreme Court will recognize that Congress never intended to allow AT&T to discriminate against women like it has been doing. Frankly, the Supreme Court should not have to be involved in this case in the first place – it is a shame that a big and wealthy company like AT&T is working so hard, and spending so much money on its lawyers, to try to win the right to pay smaller pensions to women whose only offense was that they dared to try to work and have a family at the same time.

OPPOSITION BRIEF

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No. 07-543

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AT&T CORPORATION,

Petitioner,

v.

NOREEN HULTEEN; ELEANORA COLLET; LINDA PORTER; ELIZABETH SNYDER; COMMUNICATIONS WORKERS OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND CONDITIONAL CROSS-MOTION TO FILE RESPONSIVE SUPPLEMENTAL BRIEF AND PETITIONER'S RESPONSIVE SUPPLEMENTAL BRIEF

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February 23, 2009

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PETITIONER'S OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND CONDITIONAL CROSS-MOTION TO FILE RESPONSIVE SUPPLEMENTAL BRIEF

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, petitioner AT&T respectfully submits this opposition to respondents' motion for leave to file a supplemental brief after argument, and its conditional cross-motion for leave to file the attached responsive supplemental brief.

On January 29, 2009, the President signed into law the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 ("LLFPA"). Two weeks later, on February 12, 2009, respondents filed a motion for leave to file a post-argument supplemental brief, and an attached supplemental brief. In their supplemental brief, respondents argue that the new legislation mandates affirmance of the decision below. Alternatively, they seek vacatur of the lower court's judgment without opinion by this Court, and a remand for reconsideration in light of the new legislation.

AT&T submits that the proper course in these circumstances is for the Court to resolve the issues that have been briefed and argued and allow the lower court to consider what implications, if any, the new law has for respondents' claim. If the judgment is affirmed based on pre-LLFPA law, neither this Court nor the Ninth Circuit will need to consider the LLFPA's meaning or its relevance to this case. If this Court reverses the judgment below, it can remand to allow the Ninth Circuit to determine what, if any, application the new law has to this case. Indeed, any such consideration would significantly benefit from

this Court's resolution of the issues currently pending before it. Accordingly, respondents' motion should be denied.

Should the Court nevertheless decide to grant respondents' motion and accept their supplemental brief, AT&T respectfully requests that the Court grant AT&T leave to file the attached responsive supplemental brief. As AT&T explains in that brief, the plain terms, purpose and structure of the new legislation demonstrate that it does not apply where, as here, employees seek to sue based on the present effects of past conduct that was legal when that conduct occurred.

Respectfully submitted,

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February 23, 2009

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LEGISLATIVE HISTORY

H.R. Rep. No. 110-237 (2007) 7

PETITIONER'S RESPONSIVE SUPPLEMENTAL BRIEF

Petitioner AT&T submits this supplemental brief to explain why the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (the "LLFPA"), does not affect the proper disposition of this case.

As prior briefs have shown, the service credit adjustments AT&T made for women who took pregnancy leaves before the Pregnancy Discrimination Act ("PDA") were lawful, and the PDA did not retroactively render those adjustments unlawful. Accordingly, AT&T was entitled to rely on those lawful pre-PDA adjustments when calculating post-PDA pensions. See Pet. Br. 16-21; U.S. Br. 13, 19-20. Nothing in the LLFPA alters that conclusion.

The LLFPA amends Title VII to extend the time period for bringing claims of "discrimination in compensation." LLFPA, § 3. The amendment is limited to only those suits based on the present effects of past conduct *that violated Title VII when that conduct occurred*. It does not apply where, as here, employees challenge the present effects of past conduct that did *not* violate Title VII when it occurred. Respondents' contrary arguments ignore the plain language, structure, and purpose of the LLFPA.

Further, § 3 of the LLFPA governs only *when* lawsuits may be brought. It neither expressly nor impliedly alters Title VII's standard of liability. As AT&T and the government have explained, § 703(h) provides that a seniority system's perpetuation of past sex-based discrimination is not an "unlawful employment practice" if the system, as here, is bona fide and facially neutral. Pet. Br. 47-49. No aspect of

the new law would affect this Court's ruling regarding the application of § 703(h) to this case.

Because the LLFPA does not apply, there is no need to address the other issues respondents seek to raise. As explained in detail in Part II, moreover, those issues simply underscore why this Court should resolve the issues fully briefed and argued before remanding for consideration of the effect, if any, of the LLFPA.

BACKGROUND

The LLFPA is designed narrowly to supersede this Court's decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007). See LLFPA, § 2(1) & (2). In that case, an employer unfairly evaluated Ms. Ledbetter's performance because of her sex; and, as a result, her pay was not increased as much as it would have been had she been evaluated fairly. *Ledbetter*, 127 S. Ct. at 2165-66. These discriminatory pay-setting decisions were plainly unlawful at the time they occurred, but Ms. Ledbetter did not challenge them within the relevant limitations period. This Court held that the suit she brought years later was untimely: the limitations period ran from each unlawful pay-setting decision, and did not start anew with each paycheck issued in accordance with her previously established rate of pay. *Id.* at 2169. Each new paycheck was deemed the present effect of a past act of unlawful discrimination that was no longer actionable. *Id.* at 2174.

Congress concluded that *Ledbetter* "significantly impairs statutory protections against discrimination in compensation" by imposing a restriction "on the filing of discriminatory compensation claims [that] ignores the reality of wage discrimination." LLFPA, § 2(1) & (2). Congress removed that restriction by

amending § 706(e) of Title VII, which prescribes the limitations periods for challenging practices made unlawful by Title VII's substantive proscriptions. See 42 U.S.C. § 2000e-5(e). New subsection (e)(3) expands the limitations period for claims of "discrimination in compensation" by providing that:

> [f]or purpose of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

LLFPA § 3.

ARGUMENT

I. THE NEW STATUTE DOES NOT APPLY TO THIS CASE.

A. The LLFPA has no bearing on the disposition of this case. The new subsection it adds to § 706 merely extends the limitations period for certain types of claims—those involving "discrimination in compensation"—by permitting suit based on the present effects of past conduct that violated Title VII when it occurred. This new provision, however, does not permit suit based on the present effects of conduct that was lawful when it occurred.

In attempting to show otherwise, respondents ignore the text of the statute and theorize that the LLFPA "embraces" this Court's decision in *Bazemore*

v. *Friday*, 478 U.S. 385 (1986), and "rejects" the supposedly "competing" framework of *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), which held that the present effects of actionable, but time-barred acts of discrimination do not give rise to new violations of Title VII. Resp. Supp. Br. 1-2. Nothing in the LLFPA's text supports this "interpretation" (which also fundamentally mischaracterizes *Bazemore*[1]). While the LLFPA explicitly rejects *Ledbetter*, it does not even mention *Bazemore* or *Evans*, much less "embrace[]" the former while "reject[ing]" the latter.

Instead, new subsection (e)(3) provides that "an unlawful employment practice occurs, with respect to discrimination in compensation *in violation of this title*, when" any of three specified events take place, including "when an individual is affected by application of a discriminatory compensation decision or other practice." LLFPA, § 3 (emphasis added). The underscored language, which respondents ignore, makes clear that this provision merely changes the standards governing when conduct *already prohibited by Title VII* is deemed to "occur." It thus permits suits based on the present effects of past "discrimination in compensation" when that past conduct violates (or violated) Title VII. It does not, however, amend Title VII to permit suit based on the present effects of previously *lawful* conduct.

Respondents' contrary interpretation gives no meaning to the underscored language. If Congress meant to allow suit based on the present effects of

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[1] The *Bazemore* Court saw no conflict or "competition" between its decision and *Evans*; it correctly deemed its decision "consistent with *Evans*." 478 U.S. at 396 n.6 (Brennan, J., concurring); *see also* Ptr. Reply Br. 9-11.

past compensation discrimination regardless of whether that past act was lawful when it occurred, Congress would have simply provided that "an unlawful employment practice occurs, with respect to discrimination in compensation, when" any of the three specified events takes place. Using the simpler phrase "with respect to discrimination in compensation" would have limited the provision to a particular type of discrimination—*i.e.*, that involving compensation—without regard to the lawfulness of that past discrimination. Use of the qualified phrase "with respect to discrimination in compensation *in violation of this title*" narrows the provision to past compensation discrimination that violated Title VII when it occurred.

This plain meaning is confirmed by the LLFPA's purpose and structure. The statute is expressly intended to supersede *Ledbetter*, a case in which the plaintiff challenged the current effects of past discrimination that was indisputably unlawful when it occurred. The central issue in *Ledbetter* was whether issuance of subsequent paychecks permitted Ledbetter to challenge the initial unlawful conduct. See 127 S. Ct. at 2172 (noting Ledbetter's argument that each paycheck "triggers a new EEOC charging period" permitting a challenge to the "*prior* discriminatory conduct") (emphasis added). This Court held that she could not, because the time period for challenging that initial discrimination had run. Congress responded by amending Title VII's limitations provision and allowing challenges to earlier, unlawful conduct based on a subsequent effect. As *Ledbetter* involved no claim that employees should be allowed to sue based on the present effects of previously lawful conduct, the LLFPA should not be interpreted to authorize such claims, which this

Court's cases foreclosed when the LLFPA was enacted. Pet. Br. 18-21.

Reading the LLFPA as respondents do, moreover, is inconsistent with the fact that new subsection (e)(3) amends Title VII's limitations rules, not its substantive prohibitions. Limitations provisions define when legal challenges to conduct deemed unlawful by other provisions can be brought. As respondents read it, however, new subsection (e)(3) would make it unlawful to rely on decisions or practices that were lawful when made or adopted. The provision would thus retroactively alter the legality of previously lawful conduct. It is not the office of a limitations provision to effect such a change in substantive legal norms. Cf. Tr. of Oral Arg. 19 (counsel for U.S. explaining that the PDA is not retroactive).

The preamble of the LLFPA, and the House Report from which respondents selectively quote, confirm that new subsection (e)(3) has no such effect. The preamble states that the LLFPA amends both Title VII and the Age Discrimination in Employment Act "to clarify that a discriminatory compensation decision or other practice *that is unlawful under such Acts* occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice." LLFPA, Caption (emphasis added). This language makes clear that the new provision permits suit based on a current effect of "a discriminatory compensation decision or other practice *that is [or was] unlawful under [Title VII]*" when it occurs or occurred.

The House Report respondents quote confirms this straightforward meaning. It states that the law "is drawn narrowly to define when—for purposes of the 180-day (or 300-day) statute of limitations—an unlawful employment practice (*already defined by Title*

VII) 'occurs.'" H.R. Rep. No. 110-237, at 5 (2007) (emphasis added; footnote omitted). It likewise states that the law "is designed to be a narrow reversal of the Ledbetter decision, *without upsetting any other current law*," *id.* at 17 (emphasis added)—a statement at odds with any claim that Congress rendered it unlawful to rely on decisions that were lawful when made.[2]

The LLFPA plainly does not permit suit based on the present effects of previously lawful conduct. And that is precisely the claim respondents make.

B. As AT&T and the government have shown, the Net Credited Service ("NCS") system is facially neutral. Neither that system nor its associated accrual rules draw any distinctions based on pregnancy or gender. Ptr. Br. 26; Rep. Br. 2-4; U.S. Br. 18-19. Instead, the NCS system simply gives present effect to past conduct—*i.e.*, the adjustments AT&T made to the NCS dates of women who took pregnancy leaves under AT&T's pre-PDA pregnancy leave policies.

Those pre-PDA pregnancy leave policies and resulting NCS date adjustments were entirely lawful. Title VII proscribes two broad types of discrimination—disparate treatment and disparate impact. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Respondents have disavowed any claim that AT&T's pre-PDA pregnancy leave policies and resulting NCS

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[2] This statement is also inconsistent with respondents' speculation that the LLFPA rejected *Evans*. In fact, like the *Ledbetter* dissenters, who went out of their way, *see* 127 S. Ct. at 2182 (Ginsburg, J., dissenting), to acknowledge the validity of *Evans* and *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the House Report distinguishes *Evans* and *Ricks*, noting that pay discrimination is "qualitatively different" than claims involving "'single, immediately identifiable' acts of discrimination." H.R. Rep. No. 100-237, at 15 n.71.

date adjustments had an unlawful disparate impact. Tr. of Oral Arg. at 27 ("This is a disparate treatment case."). Similarly, respondents waived any claim that AT&T's pregnancy leave policies or the NCS system were facially neutral but adopted with discriminatory purpose. Resp. Br. 18 n.5, 29.

Thus, AT&T's pre-PDA leave policies were unlawful only if they were facially discriminatory. And this Court's decision in *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), forecloses any claim of facial discrimination here. See Pet. Br. 22-24.

In sum, the NCS date adjustments caused by AT&T's pre-PDA pregnancy leave policies were lawful. Because the PDA did not retroactively render those date adjustments unlawful, AT&T's post-PDA reliance on lawfully adjusted NCS dates was likewise lawful. Thus, the LLFPA could affect the disposition of this case only if it permits suit based on the present effects of previously lawful past conduct. The plain terms, structure, purpose and history of the new legislation confirm, however, that the LLFPA does not.

C. The LLFPA modifies the statute of limitations for Title VII lawsuits. It does not affect the underlying standard of liability, including § 703(h)'s protections for bona fide seniority systems. As this Court has explained, even "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *TWA, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977). Nothing in the LLFPA diminishes Title VII's "special treatment" of bona fide seniority systems. *Id.* at 81. Respondents do not claim otherwise.

Instead, respondents tacitly accept that the LLFPA could apply to this case only if this Court were *first* to conclude that § 703(h) did not. Tellingly, respondents' discussion of why § 703(h) does not apply here is premised not on the LLFPA, but on mistaken arguments already made to this Court. See Pet. Br. 47-54.

Similarly, respondents claim that a denial of service credit, or seniority, is a "discriminatory ... other practice," within the meaning of subsection (e)(3). Resp. Supp. Br. 4-5. In fact, the phrase "other practice" is modified by the phrase "discriminatory compensation." Thus, subsection (e)(3) applies only if an employee is affected by a "discriminatory compensation decision or other [discriminatory compensation] practice."[3] See, *e.g.*, *Hughey* v. *United States*, 495 U.S. 411, 419 (1990) (rejecting broad reading of the term "other factors" "in light of the principle ... that a general statutory term should be understood in light of the specific terms that surround it"). Seniority is not "compensation"; it is a separate "term[], condition[], or privilege[] of employment" under Title VII. See Ptr. Br. 38-40; see also LLFPA, § 2(2) (*Ledbetter* "ignore[d] the reality of *wage* discrimination") (emphasis added). Thus, an employer's denial of seniority is not a "compensation decision or other [compensation] practice," and any resulting loss in

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[3] First, respondents' broader reading—*i.e.*, that the subsection refers to any other discriminatory practice—would make the reference to a "discriminatory compensation decision" superfluous. Second, the LLFPA is focused on "discrimination in compensation" and "discriminatory compensation decision," using those terms 23 times. Third, § 5 of the LLFPA makes subsection (e)(3) applicable to "claims of discrimination in compensation"—but not to other types of discrimination brought under the Americans with Disabilities Act, the Rehabilitation Act and the federal sector provisions of Title VII. *See* LLFPA § 5.

benefits is not based "in whole or in part," on a compensation decision or practice.[4]

II. ASSUMING THE LLFPA COULD CONCEIVABLY AFFECT THIS CASE, THE COURT SHOULD REVERSE THE DECISION BELOW AND REMAND FOR FURTHER PROCEEDINGS IN LIGHT OF THE LLFPA.

Because the LLFPA does not apply to this case, there is no reason to address the additional issues respondents raise concerning the scope and meaning of new subsection (e)(3). If, however, the Court harbors any doubt about the applicability of this new would be improvident to vacate the decision below without a decision and to remand for briefing on the LLFPA.

If this Court accepts respondents' contention of "facial discriminat[ion]," there is no reason for any court to consider whether the LLFPA applies here. See *Lorance* v. *AT&T Techs., Inc.*, 490 U.S. 900 (1989); § 706(e)(2) of Title VII, 42 U.S.C. 2000e-5(e)(2). But if the Court rules that respondents' adjusted NCS dates were lawful and that AT&T could (prior to the LLFPA) rely on those NCS dates when calculating post-PDA benefits, reading the LLFPA to impose liability for that reliance would raise very serious retroactivity issues. Respondents attempt to brush aside these issues by claiming that AT&T "could have complied with" the LLFPA "by using a different, nondiscriminatory measure of

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[4] Relatedly, respondents do not suggest that the LLFPA's amendment to Title VII silently repeals the provision that *directly* precedes it: § 706(e)(2), the statute of limitations provision for seniority systems. If the plain meaning of the LLFPA could be extended to denials of seniority, § 706(e)(2) would be rendered nugatory.

company service when it calculated respondents' pensions." Resp. Supp. Br. 9. But AT&T made those calculations between 1994 and 2000—some nine to 15 years before the LLFPA was enacted.

Thus, if the LLFPA could plausibly be read to apply to this case—which it cannot—such an application would upset over three decades of settled expectations concerning the legality of pre-PDA NCS date adjustments, including critical actuarial calculations and pension funding decisions. And such a reading would change the legality of pension calculations that were made more than a decade ago.

Accordingly, a determination that AT&T's actions were legal under the law that existed when it took those actions would critically inform the issues on remand. It would require the lower courts to decide whether Congress intended severe retroactive liability to be imposed on AT&T if the LLFPA permits suits based on the present effects of past lawful conduct. The lower courts would be required to examine the statutory text to determine whether it contains *clear evidence* that Congress intended such retroactive applications.[5] Moreover, because retroactive legislation can, at a certain point, run afoul of

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[5] The fact that the LLFPA applies to all claims of discrimination in compensation pending on or after May 28, 2007, LLFPA § 6, does not provide such evidence. Under *Ledbetter*, employers could not be sued based on the subsequent effects of *unlawful* compensation discrimination that was no longer actionable. Section 6 of the LLFPA retroactively alters this rule, by authorizing suits for such subsequent effects if they were the basis of a suit pending nearly two years before the LLFPA was adopted. This provision, however, does not suggest that Congress authorized suit based on the subsequent effects of *lawful* conduct—a reading that entails a far greater degree of retroactivity.

constitutional constraints, see *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 528-29 (1998) (plurality opinion), the doctrine of constitutional avoidance affects whether the LLFPA should be read to impose severely retroactive liability.

In sum, if this Court believes the LLFPA could apply to this case, it should first resolve the issues that have been fully briefed and argued, then remand for further proceedings in light of the LLFPA.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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